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Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

C. W. YOUNG COMPANY, a Corporation,
Plaintiff in Error,
vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation,
Defendant in Error.

VOLUME II.

(Pages 289 to 561, Inclusive.)

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Division Number One, at Juneau.

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United States
Circuit Court of Appeals

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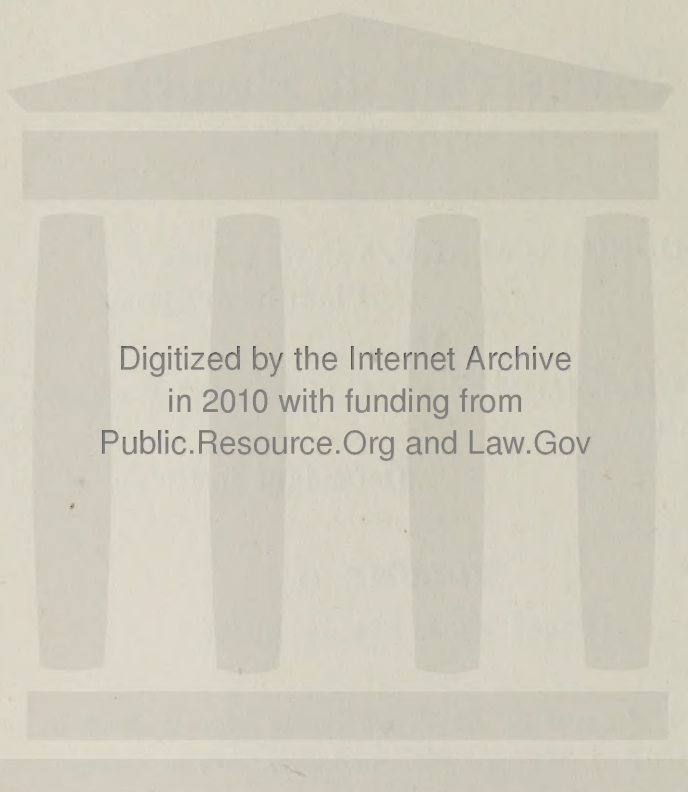
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(Testimony of J. C. McBride.)

Q. Did anyone else, or any one of these canneries, ever order through you, and I mean from the C. W. Young Company, as much as nineteen and twenty thousand gallons of refined oil at one time, Jack?

A. Not at one time.

Q. You knew nothing personally, did you about the Valdez Packing Company? A. No, sir.

Q. Didn't know whether it was a partnership or corporation? A. No, sir.

Q. You said, I think, that you had some sort of written order that was lost. Did they accompany it with any draft or check or anything of value?

A. No, sir.

Mr. FAULKNER.—Just a minute. I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

Judge WINN.—It's material under the contract. These sales were to be made for cash. There is a concern that he is seeking to recover a commission on a sale to it that he knows nothing of; never heard of them. Now, he wants a commission on it. Who was to pay for it? We couldn't pay Mr. McBride for his loss if he sold to some bankrupt concern under the terms and conditions of the contract. Suppose it was a cash transaction, unless there is something to show that it was well-established—supposing he got an order from a concern that goes into bankruptcy in a month and the [262] cash wasn't paid, would we have to pay him, then, a commission on that? That is the reason I am asking the question.

(Testimony of J. C. McBride.)

The COURT.—This order was made in 1916, wasn't it?

Judge WINN.—1917.

Mr. FAULKNER.—Under the contract the C. W. Young Company is responsible to the Union Oil Company; so it's immaterial.

The COURT.—Under the contract it was supposed to be sold for cash?

Mr. FAULKNER.—Yes.

The COURT.—And under the written contract, it was to be sold for cash. Under that contract, it could be sold for cash or credit, and the company would be charged. He may answer.

Mr. FAULKNER.—Another thing, if the Court please. It is already in the record that there are some communications between Mr. McBride and the Union Oil Company regarding this order.

The COURT.—Well, that can be shown in the instructions to the jury.

Mr. FAULKNER.—Several telegrams passed between them.

The COURT.—He may answer, whether it was to be a cash sale or not, or whether, in this case, they offered you cash or time with the order.

The WITNESS.—No; they didn't offer me any cash. The Union Oil Company wrote and told me that they had a contract with these people.

Q. Where is your letter? A. I think it is here.

Q. You think it has been offered in evidence?

A. As I recall it. [263]

The COURT.—Well, that is for you to look up.

(Testimony of J. C. McBride.)

Q. You were just acting solely, when you got this order from the Valdez Packing Company— You was acting upon the written order from that company to furnish them the oil, weren't you?

A. Yes, sir.

Q. And you didn't know who they were; never had heard of them before?

A. Oh, I heard of them.

Q. How? A. I heard of them.

Q. You had heard of them? A. Yes, sir.

Q. You had no dealings before that with them, and had no dealings with them since then?

A. No.

Q. And the order that you got from that company was not accompanied by cash or any equivalent of cash? A. No.

Q. That's all I want to know.

Judge WINN.—Your Honor, I think possible we're through with Mr. McBride.

The COURT.—Well, I think we will adjourn until to-morrow morning.

Adjourned until Tuesday, Jan. 23, 1923, at 10 A. M.

Tuesday, January 23, 1923.

Court met pursuant to adjournment at 10 o'clock A. M.

J. C. McBRIDE on witness-stand.

Cross-examination (Resumed).

(By Judge WINN.) [264]

Q. Mr. McBride, some time about the close of the cross-examination yesterday, we were speaking

(Testimony of J. C. McBride.)

about this order of the Valdez Packing Company, which amounts to 19,320 gallons for the year of 1917, of refined oil and about 1500 gallons of lubricating oil. You made some remark about, something about the Union Oil Company saying something about this order. Did you ever receive any letter from the Union Oil Company, concerning this order or any ratification of any proposed sale that you intended to make to this company of that amount of the Union Oil Company products?

A. Yes, I did.

Q. Where is it?

A. I think it was a wire, Judge.

Q. Well, where is it?

A. I don't know that I have it.

Q. It hasn't been offered in evidence in this case, has it? A. I don't think it has.

Q. You have lost that one, then, have you?

A. Well, I haven't— It has been misplaced.

Q. You made a diligent search down at the C. W. Young Company's office? A. Yes, sir.

Q. Now, you testified yesterday about some other paper writings or orders that you claimed were in writing, which you were unable to find?

A. Yes, sir.

Q. When did you ascertain that these several papers and telegrams were not among the files of the papers in the C. W. Young Company's office?

A. No; the letter that I wrote to the Union Oil Company about [265] this order was there—

(Testimony of J. C. McBride.)

Q. (Interrupting.) I don't care about that. I just want to know the date, as near as you can fix it, that you ascertained that they were not among the files—this telegram that you have just testified concerning and these other papers that you testified about yesterday that you had but that you were unable to find. When did you first find out that those papers were not in the files pertaining to this transaction between the C. W. Young Company and the Union Oil Company?

A. Now, that is regarding what orders, Judge?

Q. Well, you testified yesterday about several papers that you had lost, and what I am inquiring about now, without repeating it all over again, I am simply asking you when you ascertained that any of these papers that you testified concerning yesterday, were lost?

A. I didn't go over the records until just a year ago this month.

Q. A year ago this month? A. Yes.

Q. Well, it was, then, a year ago this month that you ascertained that these various papers that you have testified concerning were not in the records?

A. Yes, sir.

Q. That is to say, that you ascertained that they weren't there in the office? A. Yes.

Q. These records, although you had left the employ of the C. W. Young Company, were still left in the C. W. Young Company's office in the town of Juneau, were they? [266]

A. They were there and down at the dock.

(Testimony of J. C. McBride.)

Q. Down at the dock? A. Yes, sir.

Q. What dock do you mean?

A. The dock that I built to sell the oil off of.

Q. This dock that there is a cannery on now?

A. Yes, sir.

Q. And which you have referred to as the Union Oil Company dock? A. Yes, sir.

Q. You have searched both the records, then, down there at this cannery dock, or the Union Oil Company dock, as it was formerly known, and also the C. W. Young Company's office and you cannot find the papers that you testified concerning yesterday and that you claimed were lost?

A. I have searched everywhere. I am considerable— I'm short quite a few papers, quite a few of the records that I had during those years.

Q. Now, you know the papers that counsel for the C. W. Young Company has offered in evidence in this case in a general way and which have been identified by you? You know, in a general way, all these exhibits from having gone over them; you know in a general way, what they are?

A. I have heard them read here and I have read them; yes, sir.

Q. Yes, sir. Now who, or has the C. W. Young Company, to your knowledge, any other correspondence or papers pertaining to these various transactions that was had between the C. W. Young Company and the Union Oil Company, pertaining to this case? A. Have we any more?

(Testimony of J. C. McBride.)

Q. Yes, sir; any other papers, telegrams, letters, writings, and so on. [267]

A. Yes; there are other papers.

Q. There are? A. Yes.

Q. Have you got them with you?

A. In the courtroom?

Q. Yes, sir. A. No, sir.

Q. Would you object to producing them for our inspection?

A. Well, I haven't any objections; no, sir.

Q. Well, can you do it?

A. Well, I could— Could I bring them here, you mean?

Q. Yes. A. Yes, sir, if you want them.

Q. Well, I would like to have you bring, some time during the noon hour, the rest of the correspondence and papers pertaining to the transactions between the C. W. Young Company and the Union Oil Company, inasmuch as you say you have brought up only a part of it.

A. We have a lot of them. Well, I'll bring what I have.

Q. Well, you can't bring those that you haven't.

The COURT.—Continue your cross-examination and quit the arguing.

Judge WINN.—Well, at this time, if your Honor please, we will ask Mr. Faulkner to bring up the rest of the correspondence and the papers pertaining to these transactions and to have them during the noon hour so that we can inspect them and look over them.

(Testimony of J. C. McBride.)

Q. Now, you said that it was about a year ago in this month, a little over a year ago now, that you went over the records [268] and files both at the wharf and the C. W. Young Company's office and ascertained that certain papers couldn't be found.

A. Yes.

Q. When was the last time that you had gone over those records and files prior to that date?

A. I couldn't say as to that.

Q. Have you any remembrance of it?

A. No, sir.

Q. Were you here on October 9, 1920?

A. October, 1920? Yes, sir.

Q. How? A. Yes, sir.

Q. You were here then, Mr. McBride, at the time that the original complaint was filed in this case, weren't you? A. Yes, sir.

Q. Now, I will ask you how long you stayed here when you were here on October 9, 1920, when this suit was commenced. A. After the suit—?

Q. Yes, after that date in October, 1920, at the time this action was commenced. How long did you remain in Juneau at that time?

A. I think possibly four months later.

Q. Probably you remained here about four months. Did you at that time make any search to ascertain as to where these papers were that you now state are lost, as to whether or not they were among the files? A. No; I did not.

Q. On the part of the C. W. Young Company, you, of course, during that period of time of four

(Testimony of J. C. McBride.)

months that you were here, [269] consulted with the attorney for that company regarding this matter, didn't you? A. When the suit was brought?

Q. Yes, sir. A. Yes, sir.

Q. Well, then you remained here about four months and went away and returned about what time to Juneau?

A. In January. I left here, I think, in January, 1921, and returned in January, 1922.

Q. Away about a year? A. Just about a year.

Q. And during that time you had correspondence, on the part of the C. W. Young Company, with the attorneys relative to preparing for the trial of this case, did you not?

A. I had one letter; yes, sir.

Q. Only one letter? A. That I recall.

Q. Do you remember it, Mr. McBride.

(No response.)

Q. Were you here at home on November 12, 1921? A. November 12?

Q. November 12, 1921? A. No, sir.

Q. Were you here November 12, 1921?

The COURT.—He has just answered that "No."

Q. Were you here on October 13, 1921?

A. No, sir.

The COURT.—He just stated that he was away during the whole year of 1921.

Judge WINN.—Yes, that probably covers it.
[270]

Q. You didn't see any of the officials or the at-

(Testimony of J. C. McBride.)

torney for the C. W. Young Company, then, when you was away during that year?

A. Well, I might say that I saw Fisher, who was treasurer of the company. He is the only one.

Q. Now, you have stated, Mr. McBride, and have gone over quite a number of matters pertaining to them, that for some reason or other, as given by you or expressed otherwise, that you were unable to fill certain verbal understandings or, as you call them, verbal orders that you had covering the period of time, I think, during 1915, 1916 and 1917. Did you at and during that time, try to procure the kind of products that you wanted to furnish any of these parties that you have testified to, procure them from any other place than the Union Oil Company? A. From some other company?

Q. Yes. A. No, sir.

Q. Hadn't made any effort to do that at all?

A. No.

Judge WINN.—I think that's all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. McBride, you have testified to a number of orders given you which you couldn't fill during the years 1915, 1916 and 1917, and Judge Winn asked you about some conversations with these prospective purchasers covering the period of three years. Now, will you just explain that, what you mean by ordering a three years' supply? [271]

(Testimony of J. C. McBride.)

Judge WINN.—I object to it as not proper re-direct examination; not cross-examination on any new matters brought out by the cross-examination of the plaintiff.

Mr. FAULKNER.—I think it is redirect examination. He dwelt a good deal on that.

The COURT.—I don't think I care to hear from you. The questions Judge Winn put were as if the orders were made once for the whole three years. You might explain that.

Judge WINN.—Allow us an exception.

The COURT.—You may take an exception.

A. You mean regarding these contracts?

Q. The original conversations; yes.

A. Well, I discussed the contract with these different people every year.

Q. Well, in the beginning you testified about making arrangements, for instance, with some of these canneries that you have mentioned, for a three years' supply of oil. Now, explain how you came to do that.

Judge WINN.—The same objection we made to the other question, and that if he had any such conversations and contracts, or either of them, they are invalid and would be unenforceable under the statute of frauds, and it is not proper redirect examination.

The COURT.—Objection overruled.

A. I told these different gentlemen that I had a contract for this number of years and that I wanted their business accordingly.

(Testimony of J. C. McBride.)

Q. Now, that was at the beginning of the contract? A. Yes, sir.

Q. Now, during each of the years, did you have any further [272] conversations?

Judge WINN.—I object to it as leading and suggestive, and also I interpose the same objections that I interposed to the last question.

The COURT.—Objection overruled?

A. Yes, sir.

Q. Now, are there any other orders for oil that you received that are not in the bill of particulars, that you were obliged to reject because you didn't have any oil during this period mentioned?

Judge WINN.—Wait. If your Honor please, I object to that because that is evidently not redirect examination or cross-examination on any question, because I never asked him a question about any orders that he had and was unable to fill or that wasn't in the bill of particulars.

The COURT.—Objection sustained.

Mr. FAULKNER.—Well, this is the reason: I'll ask another question so that I can get the matter before the Court.

Q. Judge Winn asked you about records and memoranda and on your direct examination you testified about an order from August Buschmann's cannery. Now, I am going to ask you how you recalled that order after the bill of exceptions, the bill of particulars was filed?

Judge WINN.—We make the same objection.

(Testimony of J. C. McBride.)

Mr. FAULKNER.—I just want to state to the Court the purpose of that question.

The COURT.—I'll hear you.

Mr. FAULKNER.—Judge Winn has been asking Mr. McBride about his records, what he had in the records, what he had in his mind and now he arrived at the figures. Now I think that [273] it is proper redirect examination to ask him how he recalled to mind the August Buschmann order.

The COURT.—Objection sustained. Any reference to the August Buschmann order is not pertinent because there wasn't any examination on that order. The matter of the August Buschmann order was gone into on your examination in chief and how he happened to get that order was especially gone into by you at that time. Of course, I will allow you to re-examine him as to the loss of the records and such things as that, with reference to the loss of the records.

Mr. FAULKNER.—Well, that was on that line, your Honor.

Q. I might ask you another question. I don't want to be asking these questions on the same line right after the Court has ruled. Mr. McBride, did you find, after your bill of particulars—don't answer this until after the Judge has ruled on it—did you find any memorandum of the August Buschmann order after you filed the bill of particulars?

Judge WINN.—Object, if your Honor please.

The COURT.—Objection sustained.

(Testimony of J. C. McBride.)

Q. Now, you mentioned in the bill of particulars the launch "Carita" and stated that it belonged to the sawmill, the local sawmill here? A. Yes, sir.

Q. Did the launch "Carita" get some oil from you during the period mentioned in your bill of particulars?

Judge WINN.—Object to it as not proper redirect examination and not cross-examination on anything. This has been gone into as part of their original case. Not that I care particularly, but your Honor said he wanted to shorten the matter, and I don't like to open up this new field. [274]

The COURT.—Objection overruled.

Q. Did the launch "Carita" get some oil from you in addition to the amount that you have set down in the bill of particulars that they didn't get?

Judge WINN.—The same objection.

Q. (Continuing.) During the period set forth in the bill of particulars?

Judge WINN.—The same objection; not redirect examination.

The COURT.—I'll hear from you on that.

Mr. FAULKNER.—Well, if there is any objection insisted on, we'll withdraw that.

Q. Now, Judge Winn asked you, Mr. McBride, about the Valdez Packing Company order and you stated that you had some telegrams and letters between you and the Union Oil Company or between the C. W. Young Company and the Union Oil Company relative to this order? A. Yes, sir.

(Testimony of J. C. McBride.)

Q. Now, do those telegrams cover the complete order of 184 drums that you have testified to?

A. No, sir.

Q. Now, I'll ask you what you meant when you referred to the Defendant's Exhibits "F," "G" and "H"—

Judge WINN.—I object, if your Honor please, to his asking the witness that. Calling for a conclusion of the witness. It is a matter for the construction of the Court as to what the telegrams mean, and I would like to interpose the further objection that it is improper redirect examination and not any cross-examination on any matters that I brought out on my cross-examination. [275]

Mr. FAULKNER.—Oh, I think it is. I want to ask him just what is meant—if that is what he means.

The COURT.—Let me see.

Judge WINN.—What he meant, if your Honor please, wouldn't be binding on us. His opinion on it would be no better than the opinion of the jury on it.

The COURT.—Objection sustained as to what he meant by it.

Q. Mr. McBride, Judge Winn asked you about the boat "King & Winge" which belonged to the National Independent Fisheries Company during the years you mention in your bill of particulars. You know how much oil the "King & Winge" took at a load when she called at your dock?

(Testimony of J. C. McBride.)

Judge WINN.—I object to it, if your Honor please, having been covered by the original testimony in the case and it is not cross-examination on anything that I brought out and it is not proper redirect examination.

Mr. FAULKNER.—There wasn't anything said in the direct examination about it.

(Question repeated at the request of the Court.)

Judge WINN.—The further objection I urge, if your Honor please, is that if it is not contained in the bill of particulars it is immaterial; if it is in the bill of particulars, it has all been gone over.

The COURT.—Objection overruled.

Q. Now, will you answer that?

A. They took 6,086 gallons of distillate and ten gallons of gasoline and a barrel of lubricating oil.

Q. How much lubricating oil?

A. 48 gallons.

Judge WINN.—Wait, if your Honor please. I thought that [276] Mr. Faulkner called upon the exhibits in this case. This isn't in the papers. I was misled undoubtedly or I would have objected to it. I have a right to find out when he made the memorandum and where he got it. I thought it was one of the exhibits in the case, but this is another paper that I know nothing about and I now move to strike out the testimony and the evidence, because it appears on the presentation of the paper to the Court from which he has testified that I had no chance to examine him about it, and it is not one of the exhibits in the case and it is a self-

(Testimony of J. C. McBride.)

serving document and not binding upon the defendant and improper cross-examination.

The COURT.—Where did you get this?

Mr. FAULKNER.—I asked him if he had a memorandum. Now, if the Judge wants to cross-examine him on it—

Judge WINN.—I know, but we should have known that that wasn't one of the exhibits so that I could first make any objection and then I would move to strike it out. I now move to strike it out so that I can make my objection and let Mr. Faulkner undertake to prove his memorandum.

The COURT.—I think the whole matter is irregular. I wasn't watching it. I thought it was an exhibit myself.

Mr. FAULKNER.—No; a memorandum. I said "memorandum" when I handed it to him.

The COURT.—The question was as to how much oil the "King & Winge" could take?

Mr. FAULKNER.—At a load; yes, sir.

The COURT.—Did you ask him how he knew—?

Mr. FAULKNER.—No, I didn't, but I presume—

The COURT.—Well, if he does know, I suppose— [277]

Mr. FAULKNER.—I can easily establish that memorandum.

Q. Now, Mr. McBride, you have testified to these figures from a memorandum? A. Yes, sir.

Q. Where was that memorandum taken from?

A. From—

(Testimony of J. C. McBride.)

Judge WINN.—Wait. Object to it as incompetent, irrelevant and immaterial. He is going back to this memorandum now and he should first present it to me and let me see whether or not it is a proper memorandum and made in the proper course of his business so that he could testify from it. The same thing that I objected to, on which I was misled that it was one of the exhibits in the case.

Mr. FAULKNER.—Well, rather than have any more controversy about it, I will withdraw the whole question and get it from another witness.

The COURT.—The whole matter may be stricken.

Judge WINN.—That is stricken out then.

The COURT.—Yes.

Q. Mr. McBride, Judge Winn asked you about the preparation of the bill of particulars. Was I here when that was prepared? A. No, sir.

Judge WINN.—I didn't quite catch the first of that question. Was it whether or not Mr. Faulkner was here when that was prepared?

The COURT.—The bill of particulars.

Recross-examination.

(By Judge WINN.)

Q. It was prepared, though, under your supervision? [278]

A. Is that a question you asked me?

Q. Yes. A. Yes, sir.

Q. You prepared it in Mr. Faulkner's office, or the assistant he had?

(Testimony of J. C. McBride.)

A. No; I prepared it myself.

Q. How?

A. I made them up— You mean the legal part of it, or did you mean—?

Q. Well, how was it made up? You made it up; then what did you do with it—have it type-written? A. Mr. Roden handled it further.

Q. Mr. Roden is a member of the bar and he made up the bill of particulars which you have offered in evidence?

A. He made up the legal part of it; yes, sir.

The COURT.—Well, that's entirely immaterial anyhow.

Judge WINN.—I just want to ask him if he went over it carefully. May I ask him that question?

The COURT.—No, the cross-examination on that point is entirely immaterial. Taking up the time of the Court uselessly. The bill of particulars was prepared, presented and filed and that is enough.

(Witness excused.)

Testimony of Earl Naud, for Defendant.

EARL NAUD, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you state your name? [279]

A. Earl A. Naud.

Q. Where do you live? A. Juneau.

(Testimony of Earl Naud.)

Q. How long have you lived in Juneau?

A. Off and on about ten years.

Q. Were you in Juneau in the year 1915?

A. Yes, sir.

Q. In 1916? A. Yes, sir.

Q. 1917? A. Yes, sir.

Q. What were you doing those years?

A. In '13 and '14 I was employed by Mr. McBride in the C. W. Young Company; '15 and '16 I was employed at the courthouse in the commissioner's office.

Judge WINN.—In court where?

A. In the courthouse here; 1915 and 1916; in 1917 I was employed by the C. W. Young Company.

Q. During the year 1917 were you familiar with the Union Oil Company's business—

A. (Interposing.) Yes, sir.

Q. (Continuing.) In Juneau, and with the transactions between the C. W. Young Company and the Union Oil Company?

A. Yes, sir.

Q. In what capacity were you employed by the C. W. Young Company in the year 1917?

A. Bookkeeper.

Q. And when did you leave there?

A. In October; first of October, 1918.

Q. Did you check up the oil on hand in August or September; [280] August or September of 1918 with Mr. Trew? A. Yes, sir.

Q. During the year 1917, do you know of any orders for refined oil and lubricating oils given to

(Testimony of Earl Naud.)

the C. W. Young Company which could not be filled on account of a lack of oil? A. Yes, sir.

Judge WINN.—Now, wait. I want to get an objection in to that. Just let me make an objection now, the same as we made before. We object, if your Honor please, to any testimony or evidence being offered on either one of the cross-complaints or counterclaims as set up in the third amended answer and the third amended answer as amended, during the time— It hasn't been termed the fifth amended answer, but it would really be the fifth amended pleading—for the reason that it is irrelevant and immaterial; pertains to prospective damages and uncertain and remote damages that in nowise could be recovered, and because it clearly appears from the evidence as so far adduced in this case, that if any such orders were made, whether they were included in the bill of particulars or orders that are not in the bill of particulars, are within the meaning of the statute of frauds and therefore are not enforceable, and that no commissions of any kind—even taking everything that they say as true—could be recovered on any purported loss of sales thereunder.

The COURT.—Objection overruled.

Q. Now, Mr. Naud, have you any memorandum there from which you can recall any such orders?

A. Yes, sir.

Q. Can you give them to the jury? [281]

Judge WINN.—I object, if your Honor please, to any memorandum that Mr. Earl Naud has made

(Testimony of Earl Naud.)

up in this case, on the grounds that I have just mentioned in the other objections; and, further, that there has been no foundation laid for his testifying from this memorandum. He testified that he was down there during 1916 and there is no foundation for him to use any memorandum. A memorandum such as this is not the best evidence. If he hasn't any memory on it, he should produce the best evidence to refresh his memory, which would be any books, and so on, books of accounts between the C. W. Young Company and the plaintiff in this case.

The COURT.—I think the objection is sustainable under the way it is brought up before the court.

Q. Did you keep a record of all orders that were not filled? A. No, sir.

Q. Keep any record of orders that were not filled?

A. No, sir.

Q. Do you know of any instances where verbal orders were given that were not filled?

A. Yes, sir.

Q. Have you any independent recollection in your memory of any such instances? A. Yes, sir.

Q. Can you give them to the jury without any memorandum? A. Yes, sir.

Judge WINN.—May I ask a preliminary question?

The COURT.—No; that is sufficient. He is testifying from memory. Then you can cross-examine him on it when he is through with his examination.

(Testimony of Earl Naud.)

Judge WINN.—The only thing I want to know is if it was of his own knowledge.

The COURT.—Well, you can bring that out on your cross-examination. Of course, if he doesn't know of his own knowledge, it will be stricken out.

Q. To your best recollection, can you give such instances? A. There's the Chichagoff—

Judge WINN.—(Interrupting.) Well, the same objection goes to this, if your Honor please; the same general objection that I have made. I don't want to repeat it and encumber the record, and I now urge an exception to the ruling of the Court.

A. Chichagoff Mining Company, National Independent Fisheries, the "Anita Phillips," "Rolfe," launch "Rolfe," launch "Carita," Valdez Packing Company, launch "Dolphin," launch "Orien," launch "Caesar," George Naud, the Icy Straits Packing Company, August Buschmann—

Judge WINN.—(Interrupting.) Now, we would like, if your Honor please, to have our objections go to that and to any of those not contained in the bill of particulars; we desire to urge the special objection that it is not contained in the bill of particulars and not admissible in evidence, that they are bound by. This last one is not in the bill of particulars that they are bound by.

The COURT.—Motion will be denied.

Mr. FAULKNER.—Well, if the Court please—

The COURT.—You can separate that yourself.

Mr. FAULKNER.—(Continuing.) He has precluded the witness from using the bill of particulars. [283]

(Testimony of Earl Naud.)

The COURT.—Proceed.

A. There's H. G. Bayers—

Judge WINN.—That's the same one we objected to before, if your Honor please. There is nothing about any H. G. Bayers in the bill of particulars; and besides we—

The COURT.—(Interrupting.) Objection overruled.

Judge WINN.—(Continuing.) Urge the other objections.

A. And Pete Madsen, who owned the launch "Hegg."

Q. Now, you don't know exactly the amounts that these different persons and companies ordered?

A. No, I can't say as to that, Mr. Faulkner.

Q. Now, do you know the launch "King & Winge"? A. Yes, sir.

Q. Who owned the launch "King & Winge"?

A. The National Independent Fisheries.

Q. Do you know of selling the launch "King & Winge" any oil? A. Yes, sir.

Q. Do you know of any instances where the launch "King & Winge" called for oil and couldn't get it? A. Yes, sir.

Q. Do you know how much oil the "King & Winge" took at a load?

Judge WINN.—We object to that, if your Honor please, for the reason that Mr. Naud wasn't there during the years 1915 and 1916, and unless his testimony and evidence is confined to the years 1918 and 1917, the years that he was there, evidently it is not the best evidence. He is evidently testi-

(Testimony of Earl Naud.)

fying from some other source; and it is naturally hearsay in addition to the other objections which I have urged; and if he is testifying from hearsay and from some books or some memoranda, before he testifies at all, I think we [284] should be presented with those papers so that we can urge the proper objection, because it appears affirmatively that he wasn't there during the years of 1915, 1916 and 1917.

The COURT.—Objection overruled. The question is, do you know of certain things. You can bring it out, if he doesn't know, on your cross-examination. Do you know of any orders that were not delivered. He can answer that yes or no.

Judge WINN.—Exception, if your Honor please.

Mr. KELLEY.—May I ask counsel whether or not this question goes to just 1917 or does it go to 1916?

Mr. FAULKNER.—I said the year 1917.

(Question repeated by court reporter.)

Q. In round numbers.

A. Around six or seven thousand gallons.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Judge WINN.)

Q. Your testimony, Mr. Naud, that you have given about these orders—

Mr. FAULKNER.—(Interrupting.) Pardon me. If the Court will permit, I would like to ask the witness one other question on that.

The COURT.—Yes.

(Testimony of Earl Naud.)

(Questions by Mr. FAULKNER.)

Q. Now, Mr. Naud, have you any memorandum, or did you make any memorandum by which you would arrive at the figures that you have given as to the capacity of the "King & Winge"?

A. Yes, sir.

Q. I'll hand you a memorandum and ask you if that is it? [285] A. Yes, sir.

Q. How did you arrive at that? When did you make that?

A. Saturday; this last Saturday.

Q. How did you arrive at those figures?

A. I took it from the books; from the original charge.

Q. From the original charge? A. Yes, sir.

Mr. FAULKNER.—Now, if you want that in evidence, it's all right.

Judge WINN.—No; I don't want that in evidence. The books are the best evidence.

The COURT.—Do you offer it?

Mr. FAULKNER.—What's that?

The COURT.—Do you offer it?

Mr. FAULKNER.—No; it is just simply a memorandum.

That's all.

Cross-examination.

(By Judge WINN.)

Q. As I understood you, you had nothing to do with the C. W. Young Company's business for the years 1915 and 1916? A. No, sir.

Q. You were employed in some other capacity by some parties or corporations. A. Yes, sir.

(Testimony of Earl Naud.)

Q. Now, then, these orders that Mr. Faulkner has questioned you about, that you claim were made, refer simply to the year of 1917, do they?

A. Yes, sir; just 1917.

Q. What do you mean by orders?

A. I mean boats coming to the Union Oil dock to get oil when [286] we couldn't supply them, or orders coming through the store, people coming into the store to purchase oil.

Q. Did you have a conversation with anybody that came there to get oil, or was your conversations with Mr. McBride?

A. Both, and the men—

Q. (Interrupting.) Did you have any conversation with anybody pertaining to the Hoonah Packing Company in the year 1917, anybody coming in there to get oil when they couldn't get it on account of the fact that C. W. Young Company did not have it on hand?

A. I have heard Mr. McBride discuss it with Mr. Alexander.

Q. Where did you hear Mr. McBride discuss that with Mr. Alexander?

A. In the C. W. Young Company's office.

Q. When did you hear that?

A. Oh, it was in the early part of 1917, when Mr. Alexander came up here.

Q. Early part of 1917? A. Yes, sir.

Q. And did Mr. Alexander have his boat there to have filled with oil at that time?

A. No, sir; not that I recall. It was just a conversation about his oil business.

(Testimony of Earl Naud.)

Q. If you heard any conversation that took place between Mr. Alexander, who represented the Hoonah Packing Company in 1917, you and Mr. McBride and C. J. Alexander were present, were you, and who else?

A. Oh, I don't recall. There might have been somebody else there.

Q. What was the nature of that conversation, Mr. Naud? [287]

A. Well, as I recall it, Mr.— They were just discussing the fact of Mr. Alexander purchasing oil from the Union Oil Co., through the C. W. Young Company, and Mr. McBride mentioned the fact that he couldn't secure enough oil down there to take care of his business, and that Mr. Alexander would have been willing to give him the business provided Mr. McBride could furnish him with the oils.

Q. How many conversations did you hear of that kind? A. I don't recall.

Q. What time was that?

A. I have heard it discussed several times around the office.

Q. What dates?

A. Oh, I couldn't say as to that. Early part of the year.

Q. This was a conversation to the force and effect that if Mr. McBride had some oil that Mr. Alexander might take it from the C. W. Young Company instead of the Standard Oil Company?

A. That he would purchase from the C. W. Young Co.

(Testimony of Earl Naud.)

Q. Yes? A. Yes.

Q. Don't you know that Mr. Alexander had a contract for the year 1917 to purchase all his oil from the Standard Oil Company?

A. I don't know anything about that.

Q. Was that subject discussed at that time?

A. No, sir; I didn't hear that.

Q. This was just an offhanded conversation that took place between Mr. McBride and Mr. Alexander, was it? A. Yes, sir; a conversation.

Q. I don't believe you stated anything about the Gambier Bay cannery? [288] A. No, sir.

Q. Anything about the Taku Canning & Cold Storage Company? A. No, sir.

Q. Did you say something about the Chichagoff Mining Company? A. Yes, sir.

Q. Well, didn't your testimony that you gave, relative to that on your redirect, or your direct examination, pertain to the year 1917 only?

A. Yes, sir; I am only testifying as to 1917.

Q. You don't know anything about any prior conversations or agreements that Mr. McBride had with any of these parties in 1915 and 1916?

A. Only from hearsay, Judge.

Q. Only from hearsay. Now, with whom did Mr. McBride have any conversation about Gambier Bay?

A. I stated I didn't know anything about that.

Q. Oh. Well, the Chichagoff Mining Co., then.

A. Mr. Freeburn.

Q. Who is Mr. Freeburn?

A. He's the general manager.

(Testimony of Earl Naud.)

Q. Of the Chichagoff Mining Company?

A. Yes, sir.

Q. When and where was that conversation?

A. In 1917, at the C. W. Young Company's office.

Q. The conversation was generally about Mr. Freeburn getting oil through Mr. McBride, as representative of the C. W. Young Company?

A. Yes, sir.

Q. Were you present when the conversation took place? [289] A. Yes, sir.

Q. There was nothing said in that conversation about any—I withdraw that question. Was there anything said in that conversation that you heard in 1917, between Mr. McBride and Mr. Jim Freeburn, about any conversation that Mr. McBride and Freeburn had had prior to the one that they had in your presence?

A. I don't recall, Judge.

Q. How many gallons of oil did Mr. Freeburn want at the time that they had this conversation? Did he ask for any specific amount?

A. Well, I can just testify of my own knowledge approximately what she used—the Chichagoff used.

Q. Well, I know. You mean what she might use for the whole year, but I am asking you if there was any requests made by Mr. Freeburn upon Mr. McBride at that time—and when I say Mr. McBride, I mean the C. W. Young Company—as to any specific amounts that Mr. Freeburn wanted at that time, at the time the conversation took place?

A. I don't recall, Judge.

(Testimony of Earl Naud.)

Q. You don't recall? A. No.

Q. Do you remember what month or what date it was that this conversation took place between Mr. Freeburn and Mr. McBride?

A. No, sir; I couldn't testify as to that.

Q. Can't you tell what month in 1917 it took place in?

A. No, sir; oh, it was in the early part of the year.

Q. You couldn't tell the month?

A. I might explain— [290]

Q. (Interrupting.) I don't care about any explanation. You can do that when Mr. Faulkner questions you, Mr. Naud. You don't remember the month nor the date that this conversation took place? A. No, sir; early part of the year.

Q. What do you mean by the "early part of the year"?

A. Oh, in February or March; somewhere around there.

Q. You wouldn't say whether it was February or March?

A. No, sir; I wouldn't say. The early part of the year.

Q. Now, Mr. Naud, you didn't say anything about the Auk Bay Salmon Canning Company, did you? A. No, sir.

Q. Now, about the National Independent Fisheries, you did say something about the capacity of the boat "King & Winge"? A. Yes, sir.

Q. And this conversation that you had, pertaining to this matter, took place in 1917?

(Testimony of Earl Naud.)

A. Yes, sir.

Q. With whom—between whom did the conversation take place?

A. With the man that had charge of the oil dock.

Q. Who was the man that had charge of the oil dock?

A. There was two men there during 1917, Judge. There was McKenzie and Mr. Gohle.

Q. Well, which one was it?

A. The first conversation was with Mr. McKenzie.

Q. And then you had some other conversation. With whom was that, do you remember?

A. Mr. Gohle, I think; on two occasions.

Q. Who was the other party that represented the other side? [291] They represented the C. W. Young Co., didn't they? A. Yes, sir.

Q. Who represented the other side?

A. Nobody represented the other side. I had no discussion with anybody from the National Independent Fisheries.

Q. Then, there was no discussion that took place between anybody that represented the C. W. Young Company and anyone that represented the National Independent Fisheries Company, that took place in your presence? A. No, sir.

Judge WINN.—We move to strike out all the evidence that the witness has given on that point, because it would be hearsay. He said it was all hearsay.

Mr. FAULKNER.—Oh, I think that the witness testified that he knew they called there for oil and

(Testimony of Earl Naud.)

didn't get it during that year, on his direct examination.

The COURT.—Yes; he testified, but that is simply hearsay that they did call there. If he knew that they called there of his own knowledge, that would be different. Do you know of your own knowledge, that the boat called there and didn't get oil?

The WITNESS.—Yes, sir.

The COURT.—Outside of this conversation, from this conversation?

The WITNESS.—It was a telephone conversation; a telephone call that came up and the matter was referred to me, and they said that the "King & Winge" was there at the dock for oil and that they couldn't supply them. The manager of the dock called up the store at the time.

The COURT.—Motion denied. [292]

Judge WINN.—I insits that it is still hearsay, if your Honor please, because there was nobody from the National Independent Fisheries Company present. The statement that he received a telephone message is self-serving.

The COURT.—Well, let the jury consider it for what it's worth—an employee calling up and saying that the "King & Wing" was there.

Q. All that you know about the "King & Winge" being there was that you received a telephone message? A. Yes, sir.

Q. You had no conversation whatever with anybody connected with the National Independent

(Testimony of Earl Naud.)

Fisheries Company about this boat being there, did you? A. No, sir.

Q. Then about this boat being there and calling for oil and needing oil was purely hearsay, so far as you are concerned?

A. It was a telephone message from the man who had charge of the dock.

Q. Well, you understand what I mean by hearsay? A. Yes.

Q. You wasn't present when the "King & Winge" was down at the wharf?

A. I was'nt on the dock.

Q. No. You wasn't present at any time that the National Independent Fisheries Company or any of its representatives had any conversation with anybody at the dock or anybody who was representing the C. W. Young Company, pertaining to the obtaining of oil? A. No, sir. [293]

Judge WINN.—At which time I renew my motion to strike out the evidence of this witness.

The COURT.—Motion will be denied.

Q. You have talked over the matters pertaining to this case considerably since it was filed, have you not, Mr. Naud, since the case was commenced, with Mr. McBride and the attorneys for the C. W. Young Company?

A. Not to any great extent, only at the time that the bill of particulars was prepared, and I think on a couple of occasions since then.

Q. You have stayed here in the courtroom all the time, selecting papers and so forth? A. Yes, sir.

Q. And you, of course, you have freely discussed

(Testimony of Earl Naud.)

this matter with the attorneys for the C. W. Young Company and with Mr. McBride, haven't you?

A. I have discussed it with Mr. McBride and Mr. Faulkner.

Q. Told them what your testimony would be in this case? A. Yes, sir.

Q. Now, I don't believe you said anything about the Pacific-American Fisheries Company or James Davis or Hunter & Dickinson, did you?

A. I don't recall whether I did or not.

Q. Launch "Rolfe" and the launch "Tillacum." Did you say anything about the "Anita Phillips"?

A. Yes, sir; and the launch "Rolfe," too.

Q. Did you? A. Yes, sir.

Q. Well, now, the testimony that you gave concerning the launch "Rolfe" was regarding matters or conferences that took place [294] in 1917, were they? A. Yes, sir.

Q. Where did these conversations take place?

A. In the office of the C. W. Young Company.

Q. Who was present?

A. Mr. McBride and myself and Oswald Olson, the master of the vessel.

Q. Who was this Oswald Olson?

A. Master of the "Rolfe."

Q. Many times— How many times did that conversation take place there when you three were present?

A. I don't recall whether we three were present all the time. Olson and I were present all the time—three or four times during the year.

(Testimony of Earl Naud.)

Q. And the conversation was to the extent that they called there for oil on the "Rolfe" and couldn't get it? A. Yes, sir.

Q. Do you know the amount now, without looking at the books, or refreshing your memory from the books, or any other memoranda, as to how much the launch "Rolfe" wanted of refined or lubricating oil at any particular time when she called for it?

A. She would load at least two thousand gallons.

Q. I didn't ask you what she is loaded with. Do you remember any specific request made, or any specific demand for any particular amount of oil at any particular time during any of these conversations that you have just referred to a while ago?

A. To the best of my recollection, he wanted two thousand gallons.

Q. That is your best recollection?

A. Yes, sir. [295]

Q. You wouldn't be sure of that, would you, Mr. Naud?

A. Well, it was approximately that, Judge.

Q. Well, what was the words he said, so that the Court and jury can understand it?

A. He simply came to the office. He was purchasing a lot of supplies for his boat. He used to trade at our store altogether, and he said he wanted to go down and load up with oil, and we told him we couldn't give him any oil. In fact, I told him I didn't think we could give him any oil, and he went down to see if he could get it and he couldn't

(Testimony of Earl Naud.)

get sufficient oil and he went down to the Standard Oil Company.

Q. How do you know he didn't get it?

A. We didn't have it.

Q. How do you know you didn't have it?

A. The man at the dock told me as well as Captain Olson.

Q. Both Captain Olson and the man at the dock told you that?

A. That is to the best of my recollection; yes, sir.

Q. Now, then, there was nothing, in either one of those conversations, Earl, was there, mentioned about any specific amounts of either refined or lubricating oil that this man who was on the "Rolfe" wanted—the number of gallons?

A. I said, to the best of my recollection it was approximately 2,000 gallons he wanted. I couldn't tell you exactly how much and neither could they, because they might have oil in their tanks.

Q. He didn't say that I want 2,000 gallons or I want 1500 gallons or I want any specific number of gallons; he didn't designate the amount, did he?
[296]

A. No; he couldn't designate that. He wanted to fill his tanks and he couldn't tell.

Q. And how much it took to fill his tanks, of course you don't know? A. Only approximately.

Q. Well, you didn't know how much was in the tanks?

A. I'm judging from the size of the boat and

(Testimony of Earl Naud.)

things like that. I could testify approximately what her capacity would be.

Q. Oh, yes; I understand that. But you said, just now, that you didn't know how much oil she wanted because you didn't know how much oil she had in her tanks, on the boat.

A. I testified approximately 2,000 gallons.

Q. How did you arrive at that?

A. To the best of my recollection that was the conversation we had. He wanted about 2,000 gallons.

Q. That would be as strong as you would put it—to the best of your recollection? A. Yes, sir.

Q. You wouldn't swear to it positively?

A. No, sir; just as I recall that.

Q. Do you recall that from any conversations that you had with anybody else or from examining the books of the C. W. Young Company?

A. No, sir; that is from my own knowledge.

Q. This was substantially the same conversation that took place at each time that the captain, or whoever it was that was running the "Rolfe," had when he came to town?

A. He used to come into the office and spend most of his time there when he came into town.
[297]

Q. How many times did he come there?

A. About four or five times during that year.

Q. That is your best recollection?

A. Yes, sir.

(Testimony of Earl Naud.)

Q. You wouldn't swear positively as to how many times he came there, would you?

A. No, sir.

Q. And you wouldn't swear positively as to how much oil, either refined or lubricating it was that he wanted at any one of those times that he came there?

A. No, sir.

Q. Launch "Tillacum," you didn't know anything about her.

A. Yes; I know something about her; yes, sir.

Q. Did you testify about her on your direct examination? I have forgot?

A. I don't remember whether I did or not.

Q. Well, what do you know about her?

A. I know that Mr. Christoe operated her during that year. I think he had some kind of a herring plant or something.

Q. Did you hear any conversation that took place between Mr. James Christoe and Mr. McBride?

A. I don't recall.

Q. You don't recall about that. Now, you didn't hear any conversation that took place between Mr. McBride and any other person concerning the launch "Tillacum" wanting oil, and when I say that I mean any interested party on the launch "Tillacum"?

A. Well, I know of one occasion when the "Tillacum" called for oil. [298]

Q. Well, how do you know she called for oil?

A. From the man at the dock.

(Testimony of Earl Naud.)

Q. You know that from hearsay?

A. Yes, sir; from what he told me.

Q. You were bookkeeper in 1917 in the C. W. Young Company's store, which is in Juneau, Alaska, at the same place it is now? A. Yes, sir.

Q. And this wharf that you are speaking about where the C. W. Young Company was handling the oil of the Union Oil Company, was approximately what distance from the store?

A. Oh, it's about a mile and a half, I guess—two miles.

Q. And all that you know about that is what somebody else told you? A. About what, Judge?

Q. About the "Tillacum" wanting any oil?

A. What the oil dock man told me; yes, sir.

Judge WINN.—We move to strike it out as not the best evidence and hearsay.

The COURT.—What is the usual custom when a boat calls for oil at the dock—for the man to telephone to you to get the order or not?

The WITNESS.—Yes, sir; as a rule he would call us up on each occasion and tell us about it and he used to come up to the store about every other day to turn in his charge slips and he used to make out his cash, and he used to, if Mr. McBride was there—

The COURT.—Well, now, just answer the question. When a boat called for oil there, would the order be turned into the office? [299]

A. No, sir.

(Testimony of Earl Naud.)

The COURT.—(Continuing.) As a direct charge?

The WITNESS.—The charge would be turned in after the boat was supplied with oil.

The COURT.—Well, suppose you couldn't supply the oil.

The WITNESS.—(Continuing.) And he would generally call us up as to giving credit, on each occasion.

The COURT.—Objection overruled.

Q. What did the man at the wharf say to you when he called you up regarding the launch "Tillacum" wanting oil?

A. Oh, I can't recall as to that, Judge. I just remember the occasion of it.

Q. You don't know the amount of your own knowledge? A. Oh, no.

Q. That they wanted? A. No, sir.

Q. And you don't know of your own knowledge that the "Tillacum" was there at all?

A. Yes, sir; she was there.

Q. Did you see her? A. No, sir.

Q. Were you down at the dock? A. No, sir.

Q. Do you understand the term as to what you know of your own knowledge and what you know from hearsay, Mr. Naud? A. Yes, sir.

Q. Well, all you know about it is what somebody told you about the launch "Tillacum" being down there? A. What the oil man told me. [300]

Q. Is that of your own knowledge or is that

(Testimony of Earl Naud.)

hearsay? I want to see what you understand about testimony.

Mr. FAULKNER.—Just a minute. I think that is argumentative.

Judge WINN.—He said he knew of his own knowledge.

The COURT.—Well, he has testified. Simply taking up the time of the Court.

Judge WINN.—Well, Mr. Faulkner is a very poor one to complain about taking up the time of the court in this case, if your Honor please.

Q. The “Anita Phillips.” What do you know about her?

A. I know that she called there on different occasions for oil and we couldn’t supply her, and I know that of my own knowledge.

Q. You know that of your own knowledge?

A. Yes, sir.

Q. Who was the commander of her?

A. Captain Jack Rowe.

Q. Did Captain Jack Rowe call at the office, in 1917, of the C. W. Young Company and have any conversation with you or with Mr. McBride about oil? A. Yes, sir.

Q. How many times during 1917?

A. A good many times—half a dozen or a dozen times.

Q. Now, then—

A. (Interrupting.) We did sell him some oil.

Q. Now, during the year 1917, then, how many gallons of oil did the captain of the “Anita Phil-

(Testimony of Earl Naud.)

lips" call at the office and ask for in your presence? A. I couldn't say as to that.

Q. You don't know the number of gallons of oil that he asked [301] for that he couldn't get?

A. Wanted to fill his tanks.

Q. How do you know he wanted to fill his tanks?

A. That is what he said.

Q. Who said that? A. Captain Rowe.

Q. McBride was there, representing the C. W. Young Company?

A. Oh, I don't know that he was there on all those occasions. I don't know who was there.

Q. Do you know whether or not he had any oil in the tanks of the "Anita Phillips"?

A. No, sir.

Q. When did you first ascertain as to what the tanks of the "Anita Phillips" would hold?

A. I haven't ascertained. I don't know.

Q. Your testimony, then, as to what the tanks on the gas boat "Anita Phillips" would hold is a mere estimation or a guess?

A. Yes; it is an estimation.

Q. She's sunk now, isn't she? A. Yes, sir.

Q. Do you remember what time in the year of 1917 it was that Captain Rowe called at the office of the C. W. Young Company and had any of these conversations that you have referred to?

A. Oh, at various times during the year.

Q. How many times?

A. Oh, it might have been a dozen times.

Q. A dozen times. A. Yes, sir. [302]

(Testimony of Earl Naud.)

Q. Well, would you say it was a dozen, or ten or eight? A. Possibly a dozen times.

Q. Possibly. That is as strong as you would put it? A. Yes, sir; I couldn't say exactly.

Q. When was the first time in 1917 that he called at the office, do you remember?

A. Oh, in the early part of the year; around the first of the year.

Q. Do you remember what month? A. No, sir.

Q. Do you know whether it was January, February or March?

A. January or February, I suppose.

Q. January or February, you suppose?

A. Yes, sir.

Q. You are not positive? A. No, sir.

Q. You wouldn't say positively whether it was in the month of March or not, would you?

A. No, sir.

Q. And he said he wanted to fill the tanks of the "Anita Phillips." Is that the language he used?

A. Oh; in substance; yes, sir.

Q. Well, in substance. What do you mean?

A. Well, he come in and said he wanted to get some oil; that he wanted to fill his tanks to make a trip. He was a halibut fisherman and he was fishing at the time, I think.

Q. Wanted to get some oil to fill his tanks?

A. Yes, sir.

Q. And you drew your conclusion from that that he wanted the full capacity of his tanks? [303]

A. Yes, sir.

(Testimony of Earl Naud.)

Q. He didn't state to you and you didn't know how much oil he had in his tanks? A. No, sir.

Q. When was the last conversation that you had about any oil. You have given as near as you can, approximately the first conversation. When was the last time?

A. I couldn't say; possibly the latter part of the year; around November or December.

Q. What was he doing with the "Anita Phillips" during that time, do you know?

A. As I recall it, he was halibut fishing and doing odd jobs with her.

Q. Pete Madsen, owner of the gas boat "Hegg." Did Pete Madsen have any conversation with Mr. McBride in your presence during the year of 1917?

A. Yes, sir.

Q. About his wanting any refined oil or lubricating oil during the year of 1917? A. Yes, sir.

Q. When was that conversation?

A. He had been in on several occasions.

Q. When was the first conversation?

A. Oh, I should say the early part of the year.

Q. What do you mean by the early part of the year? A. January or February.

Q. This conversation was had with Mr. McBride? A. Yes, sir.

Q. In your presence? A. Yes, sir. [304]

Q. Did he state any specific amount of lubricating oil or refined oil that he wanted? A. No, sir.

Q. In either one of these conversations?

A. No, sir.

(Testimony of Earl Naud.)

Q. Did not. A. No, sir.

Q. The "Gypsy." You know anything about her? A. No, sir.

Q. The launch "Pacific"? A. Yes, sir.

Q. Launch "Pacific." What was it you stated about her?

A. Captain Tibbits was operating her and he had been in our office and told us that he wanted to get some oil and couldn't get it.

Q. He was there in 1917? A. Yes, sir.

Q. Told you he wanted to secure oil?

A. Yes, sir.

Q. How much oil did he tell you he wanted to secure in 1917?

A. He wanted to buy all of his oil from us. We did sell him some; not much.

Q. That was the launch "Pacific"?

A. Yes, sir.

Q. You stated you knew about this bill of particulars. Now, then, you have set forth in the bill of particulars, which you assisted in making out, that during the year 1915, 1917, he wanted for the year 250 gallons. Is that correct. Look at the bill of particulars. You helped McBride make it [305] out.

A. That is 250 gallons of lubricating oil.

Q. What is the other?

A. 5,000 gallons of distillate.

Q. Under what head?

A. Third column, in 1917.

(Testimony of Earl Naud.)

Q. Now, then, when he came in there, did he say at this one conversation, that he wanted 5,000 gallons of refined oil?

A. As I recall it, he said he would at least need that, and probably more than that during the season.

Q. He said he would at least burn that much oil during the year 1917? A. Yes, sir.

Q. With whom did he have that conversation?

A. Mr. McBride.

Q. Who? A. Mr. McBride.

Q. That took place in your presence?

A. Yes, sir.

Q. How much of this 5,000 gallons did he get, if any?

A. I think— I don't think he got any oil to speak of. He might have.

Q. Did he get any amount?

A. Nothing to speak of.

Q. The conversation was, then, as you stated, in the bill of particulars, that during the year 1917, he would use about 5,000 gallons of refined oil and about 250 gallons of lubricating oil?

A. Yes; at least that.

Q. But he didn't get any of it on account of your shortage? [306] A. Yes, sir.

Q. That is, you mean, yes, he didn't get any?

A. Oh, no, sir; he didn't get any.

Q. That's right. I wanted to understand you. What other boats do you remember or the owners of them, that called there?

(Testimony of Earl Naud.)

A. There's Fred Ramm on the "Dolphin."

Q. Fred Ramm. Where did that conversation take place?

A. As I testified before, the "Dolphin" called at the dock, several times for oil. I didn't hear any conversation between Mr. Ramm and Mr. McBride.

Q. You didn't hear any conversation with Mr. Ramm at all, and the only reason why you say you know that she called at the dock is you got some telephone message?

A. Either a telephone message or the oil dock man speaking to us personally; yes, sir.

Q. How?

A. Either that I got a telephone message or the oil dock man told me. He was up to the office, to the store, pretty near every day.

Q. Which was it, a telephone message or speaking?

A. Probably a telephone message, because, as a rule, he called up about all the boats that couldn't be furnished with oil.

Q. And you only know about this particular matter through what you received from a telephone message?

A. That was probably it; yes, sir.

Q. We move to strike it out as hearsay, if your Honor please.

The COURT.—Motion denied.

Q. Well, on that matter, you say that he wanted

(Testimony of Earl Naud.)

how many gallons? At this time do you know—when he first called up?

A. Fred Ramm? [307]

Q. Yes, sir.

A. I couldn't say, Judge, how many gallons he wanted. The "Dolphin" was a fairly good-sized boat.

Q. You don't know of your own knowledge, do you, Earl, how much gasoline and how much lubricating oil she had on board? A. No, sir.

Q. At the time somebody called up, that you took to be the man at the wharf? A. No, sir.

Q. And you don't know, Mr. Naud, of your own knowledge, how much Mr. Ramm, whatever his name is, wanted at any particular time during 1917, of your own knowledge?

A. Oh, no, sir; no particular knowledge.

Q. What others are there?

A. There is the launch "Orien," I think, that I haven't testified to.

Q. Who was on the launch "Orien"?

A. I have forgotten the man's name. They had an account at the store.

Q. You don't know his name?

A. No, sir; I don't recall. We carried the names under the name of the boat, the account.

Q. And all you know about this is what somebody else called you up, supposed to be down at the wharf, and told you about the launch being there?

A. Yes; and my recollection is that they were in the store there and we were discussing it.

(Testimony of Earl Naud.)

Q. Will you swear positively, to the jury, that there was anybody representing the "Orien" that had any conversation with Mr. McBride, in your presence, about securing oil during the year 1917?

[308] A. No, sir.

Q. You wouldn't? A. No, sir.

Q. You don't know whether or not your knowledge was gained from that call through somebody calling you up who was supposed to be at the wharf, or whether it was from some other source you gained it?

A. It was from the dock.

Q. From the dock. You have no information on that subject, of your own knowledge at all, have you? A. Yes, sir.

Q. What?

A. Only from the dock, as I have testified.

Q. Is that of your own knowledge, or is that what somebody told you?

A. That is what the dock man told me; yes, sir.

Q. Told you over the phone?

A. Either over the telephone or personally.

Q. Was anybody present, representing the owner of the boat or anybody representing the C. W. Young Company at the time that you received these orders?

A. I don't recall whether there was anybody in the office or not.

Judge WINN.—We make the same motion to strike it out.

The COURT.—Motion denied.

(Testimony of Earl Naud.)

Q. What others? A. There is the "Carita."

Q. That's the one that is down at the sawmill?

A. Yes, sir.

Q. What did you hear about the "Carita" in 1917? [309]

A. I heard Mr. Worthen discuss it with Mr. McBride. He was the manager of the mill and owned the boat.

Q. How many times did he discuss, or did you hear it discussed?

A. Oh, once or twice; maybe it was once.

Q. Was that in the office of the C. W. Young Company? A. Yes, sir.

Q. Mr. Worthen was superintendent of the saw-mill? A. Yes, sir.

Q. When did you hear that conversation?

A. I think it was in the early part of 1917.

Q. Either in the month of January or February?

A. Oh, I shouldn't say what month it was. It may have been in March and it might have been in April.

Q. You have nothing with which to refresh your memory about these conversations, excepting your recollection?

A. Just my recollection.

Q. Have you tried to refresh your recollection or remembrance of these matters in conversation with anybody else concerning these matters?

A. No, sir; not with anyone else.

Q. You couldn't state to the Court and jury what month any of these conversations took place

(Testimony of Earl Naud.)

between Mr. McBride and Mr. Worthen during 1917?

A. No, sir; only in the early part of the year.

Q. How many gallons of refined oil and how many gallons of lubricating oil did Mr. Worthen want at that time?

A. You mean what his yearly use was?

Q. No; I mean at any time.

A. At one particular time?

Q. Yes. [310] A. I don't know.

Q. You don't know anything about the capacity of his boat except from hearsay?

A. Just a general idea.

Q. Did you ever examine the tanks of his boat?

A. No, sir.

Q. At any time that he came to the C. W. Young Company's office you don't—and made inquiries concerning oil, you don't know the specific amounts of any grade of oil? A. No, sir.

Q. Or grease that he needed? A. No, sir.

Q. Anyone else, Mr. Naud?

A. You mean any other boats?

Q. Any other persons or boats or anything else. It's in the bill of particulars. You are acquainted with the bill of particulars? A. Yes, sir.

Q. Who else? A. George Naud, 4,000 gallons.

Q. George Naud is your brother? A. Yes, sir.

Q. Is he in town? A. Yes, sir.

Q. He is a Government official in the prohibition service? A. Yes, sir.

(Testimony of Earl Naud.)

Q. Where did this conversation take place between Mr. McBride and Mr. George Naud?

A. At the C. W. Young Company's office. [311]

Q. Was you present? A. Yes, sir.

Q. In 1917? A. Yes, sir.

Q. What boat did he have?

A. I don't remember what boat he had. He was buying fish down at the Taku river.

Q. How many conversations did George Naud have with Mr. McBride in your presence during the year 1917? A. Two or three.

Q. When was the first conversation he had?

A. I think it was somewhere around May.

Q. This conversation was some time in May?

A. It might have been.

Q. When was the second one?

A. About a month later.

Q. Did he have the third?

A. Oh, he was in there all the time.

Q. Made that his headquarters?

A. Not exactly. He used to hang around when he was in town.

Q. Now, in the first conversation, how many gallons of refined oil and how many gallons of lubricating oil did he want?

A. He wanted— It was regarding a price. He wanted to get a half a cent off. Can I explain this in my own words?

Q. Well, I don't care. You tell the conversation.

A. Well, he came in, Judge, and said that he would be glad to buy the oils from us if we would

(Testimony of Earl Naud.)

make him the same price as the Standard; that they were giving him a half a cent off; that he was getting these oils, as I recall it, from some of the fishermen down at the Taku, and I wrote a letter [312] to the Union Oil Company to get permission to get a half a cent off, and we received a reply to that; and I think it was 8,000 gallons of refined oil and 400 gallons of lubricating oil that he said he would take.

Q. Have you that letter? A. I have not.

Q. It is one of the letters that you have selected and which was made one of the exhibits?

A. I don't know as I selected it.

Q. Well, you sat over there and selected it and handed it over to Mr. Faulkner.

A. Oh, I don't know.

Q. Then was an understanding had between George Naud, your brother and Mr. McBride, that George Naud should be furnished this 8,000 gallons of refined oil and 4,000 gallons—

The COURT.—(Interrupting.) 400.

Q. (Continuing.) 400 gallons of lubricating oil?

A. If we had the oil; yes, sir.

Q. If you had the oil. Now, then, in your bill of particulars, Mr. Naud, there is a commission asked on the total amount of 8,000 gallons of refined oil and 4,000 gallons of lubricating oil. The consequence of it was that there was none of the 8,000 gallons and none of the 4,000 gallons delivered?

A. 400 gallons. There was none of it delivered.

(Testimony of Earl Naud.)

Q. None of it delivered? A. No, sir.

Q. I mean 400; pardon me. A. Yes, sir.

Q. No cash was paid down for it? [313]

A. No, sir.

Q. No contract or written agreement or memorandum signed by George Naud for it?

A. George wrote us a letter, as I recall it. I think I wrote the letter and he signed it.

Q. Where is it?

A. I don't know where the letter is. I never seen it. I was looking for it in the files, but it isn't in the files. But we got it because I remember writing the letter. He had me write it on the typewriter and he signed it.

Q. To whom did you address this letter?

A. To the C. W. Young Company.

Q. What was the necessity of writing that letter?

A. I think so that we could send a copy of the letter to the Union Oil Company at Seattle. That is my recollection. I may be mistaken about that.

Q. You wouldn't be positive about that?

A. No, sir.

Q. Anyway, you assisted Mr. McBride, faithfully and systematically in going over the records and files of all the papers and correspondence had between the C. W. Young Company and the Union Oil Company, pertaining to these various transactions for both 1915, for the three years 1915, 1916 and 1917, have you?

A. I assisted him for a few days; yes, sir.

Q. And you know, of course, the number of tele-

(Testimony of Earl Naud.)

grams and papers and other instruments that have been offered in evidence in this case by Mr. Faulkner on his direct examination of Mr. McBride?

A. Yes, sir. [314]

A. *Yes, sir.*

Q. Those are the only papers that you have been able to find in the office of the C. W. Young Company, or in the office down at the wharf; that is the wharf that used to be termed the Union Oil dock and now has a cannery on it. Have you examined both of those offices?

A. Yes, sir. I kind of got the correspondence there together at one time. I think it was in 1920. It was scattered all over. There was some of it down at the cannery and some of it stored way downstairs and some of it in the office. In fact, there was a lot of it missing and we never could find it, and there was a lot of charge slips, too.

Q. Now, Mr. Naud, you remember about the time that this suit was commenced, which was filed—the complaint was filed, as appears on the face of the complaint and mark made thereon by the clerk of the court, October 9, 1920. You remember about the time that this suit was commenced, don't you? A. Yes, sir.

Q. Now, then, did you commence then to look over the records of the C. W. Young Company, both at the office and down at the dock, to gather the information to make out the bill of particulars, which was eventually filed in this case?

A. No, sir.

(Testimony of Earl Naud.)

Q. When did you first commence looking over the records and files of the C. W. Young Company, pertaining to any papers that was connected with this case?

A. You mean in connection with the bill of particulars, Judge?

Q. Yes, sir.

A. In January, 1922. That's in connection with the bill of [315] particulars.

Q. Well, that's in connection with the bill of particulars. Did you converse with Mr. McBride when he was here in 1921, before he went east concerning this suit? A. Yes, sir.

Q. The suit was commenced in October, 1920, and you had several conversations with Mr. McBride at that time, did you? A. Yes, sir.

Q. Before he left? A. Yes, sir.

Q. You were instructed by Mr. McBride to give the attorneys, or the attorney, whichever the case may be, for the C. W. Young Company, all the information that you could gather from the files and any other information you had concerning this suit.

A. I had no specific instructions.

Q. Well, was you requested, or did he ask you or did any of the attorneys ask you to get up this information?

A. No, sir, I was never present; I mean I was never requested to get it up.

Q. Well, how did you—

A. (Interrupting.) I was requested by Mr. McBride to assist them with the bill of particulars

(Testimony of Earl Naud.)

when he returned from Washington in January, 1922.

Q. That is the first time that you talked with either the attorneys for the C. W. Young Company or Mr. McBride concerning it—

Mr. FAULKNER.—(Interrupting.) Just a minute, if the Court please. We object to any further examination along this [316] line as not cross-examination and only taking up the time of the Court.

The COURT.—I don't think it is cross-examination.

Judge WINN.—He testified about making up the bill of particulars, and I think I ought to have the right to go into the bill of particulars.

The COURT.—Objection sustained.

Q. Then, as you have already answered the question, then in 1922, about the time that the bill of particulars was gotten up, is the first time that you went through the books and records and files of the C. W. Young Company to ascertain the facts in order to base the bill of particulars on?

Mr. FAULKNER.—The same objection.

Judge WINN.—That is proper, if your Honor please. That is when he claims it was filed.

Mr. FAULKNER.—Not proper cross-examination.

Judge WINN.—Why, he went over the whole bill of particulars and everything.

The COURT.—He testified from his own knowledge. You objected to his testifying from the bill of particulars. Objection sustained.

(Testimony of Earl Naud.)

Q. Now, in testifying from your own knowledge to Mr. Faulkner about these various items that you have testified concerning that certain calls were made there, did you rely on your memory or remember it from the business of the C. W. Young Company that took place there in 1917, or did you refresh your memory to answer these questions of Mr. Faulkner's from examining the records and files of that office?

A. From my own knowledge; from memory.

Q. Just from memory? [317] A. Yes, sir.

Q. Can you state to the Court and jury that these facts, of all these particular boats, as to the amounts that they wanted and the capacity of them, and so on that you testified entirely from your own knowledge, without an examination, without making any inquiry of any one else or without examining the records of the C. W. Young Company?

A. I didn't testify as to any capacities, but this is all of my own knowledge, yes, sir, what I have testified to.

Q. You have remembered those facts without examining anything in your office? A. Yes, sir.

Q. Do you remember all of the running accounts from your own knowledge, of the C. W. Young Company in 1917?

A. I remember a good many of them; sure; yes, sir.

Q. About five years ago and you carry that in your memory, do you? A. Yes, sir.

(Testimony of Earl Naud.)

Q. During 1917 the C. W. Young Company had quite a business and there was quite a number of purchases and receipts and so forth down at the office quite a set of books to keep? A. Yes, sir.

Q. And you had quite a lot of work to do there?

A. Yes, sir.

Q. Still you carry it all in your memory?

A. I don't carry them in my memory. I say I'm generally familiar with accounts in 1917 of that company.

Q. And the items of the accounts?

A. Oh, I couldn't state the items; no, sir. [318]

Q. Well, now, about the "King & Winge," Mr. Naud, just to go back to one more matter. You don't know of your own knowledge, Mr. Naud, as to how much the "King & Winge" would take of either refined or lubricating oil at any particular time when she called at the dock? A. Yes, sir.

Q. From your own knowledge?

A. Because I know just about what she took whenever she loaded oil. She was loaded two or three times down there.

Q. Well, you examined the bill of particulars and you know the amount of oil that you say that it was she contracts for and didn't get. Now, then, do you know, in order to make up those items in the bill of particulars, how much the "King & Winge" wanted at any particular time that she called? A. Yes, sir..

Q. You know that of your own knowledge?

A. Yes, sir.

Q. From conversations with whom?

(Testimony of Earl Naud.)

A. Mr. McKenzie at the Union Oil Dock over the telephone.

Q. Mr. McKenzie? A. Yes, sir.

Q. Of the Union Oil Company?

A. At the dock.

Q. At the Union Oil Company's dock?

A. Yes, sir.

Q. Do you recall that of your own knowledge?

A. Yes, sir.

The COURT.—From orders delivered through him to you?

The WITNESS.—No, sir; he would call up and have them O. K'd, and then is when the original order came to the store [319] or the charge, rather, after the oil was taken.

Q. But when she didn't take any oil there was no memorandum sent into your office?

A. Mr. McKenzie called up the office and said that the "King & Winge" wanted 8,000 gallons of oil that he couldn't furnish.

Q. I asked you when she didn't get any oil, there wasn't any memorandum handed in to you, was there? A. No, sir; none.

Q. The consequence was, in regard to these complaints that you make about shortages of oil and your inability to supply the "King & Winge," that there would be nothing communicated to you except what somebody else told you?

A. What Mr. McKenzie told me or Mr. Gohle.

Q. Who? A. Mr. Gohle.

Q. Who is he?

A. He was at the Union Oil dock in 1917.

(Testimony of Earl Naud.)

Q. They was both employed there at the dock?

A. Yes; Mr. Goldie succeeded Mr. McKenzie.

Judge WINN.—I don't know whether I went into that a while ago. I'll ask to strike out that part of the testimony as being hearsay.

The COURT.—Motion denied.

Judge WINN.—Allow us an exception, if your Honor please.

Q. How much lubricating oil would the "King & Wing" usually take when she got oil of Mr. McBride or the C. W. Young Co.?

A. I couldn't say as to that, Judge, exactly how much she would take; no, sir.

Q. Well, what did she usually take—one barrel or two barrels of lubricating oil? [320]

A. I couldn't tell. Just depends probably on how much she had on board.

Q. And these particular times that you didn't have lubricating oil to supply, you don't know anything about how much lubricating oil she wanted?

A. No, sir; because that wasn't mentioned—how much lubricating—

Q. (Interrupting.) That wasn't mentioned. You had lubricating oil on hand all the time, didn't you? A. Yes, sir.

Q. There wasn't any scarcity of lubricating oil?

A. In some grades there was. We had a pretty good stock of lubricating oils.

Judge WINN.—I think that's all.

(Testimony of Earl Naud.)

Redirect Examination.

(By Mr. FAULKNER.)

Q. What is Mr. McKenzie's name?

A. F. D. McKenzie.

Q. Where is he now?

A. He is, as I understand it, employed by the Union Oil Company.

Recross-examination.

(By Judge WINN.)

Q. Working for the Union Oil Company?

A. Yes, sir.

Q. Where?

A. In Seattle, the last I heard of him—running on a boat.

Q. How do you know that?

A. Well, when I was in Seattle in 1920, or something like that, I called on Mr. Trew, and I asked where Mac was, and he [321] said he was working for the company.

Q. You don't know where he is working now?

A. No; from hearsay I just understood that he is still employed there.

Judge WINN.—That's all.

Mr. FAULKNER.—That's all.

(Witness excused.)

Testimony of C. E. Tibbits, for Defendant.

C. E. TIBBITS, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you please state your name, Captain?

A. C. E. Tibbits.

Q. Where do you live? A. Juneau.

Q. During the years 1915, 1916 and 1917, where did you live? A. Juneau.

Q. You had a gas boat of your own at that time?

A. Yes, sir.

Q. Did you have any dealings with the C. W. Young Company regarding the purchase of refined oil and lubricating oil during those years?

A. I had a verbal understanding or agreement with them to take oil from them.

Q. Did you get the oil?

A. I got some, but I couldn't get what I required.

Q. How much did you require that you couldn't get?

Judge WINN.—I object to it as incompetent, irrelevant and [322] immaterial and as speculative and uncertain, and so far as the recovery is concerned, his profits and the agreement, if any, as the evidence already shows, comes within the statute of frauds and hence could not have any binding force and effect upon the plaintiff in this case.

(Testimony of C. E. Tibbits.)

The COURT.—Objection overruled.

Judge WINN.—Your Honor will understand that there is no use of repeating it.

Q. How much did you get? How much did you require during each of those three years that you couldn't get of refined oil?

A. I couldn't say exactly, but at lease 5,000 gallons a year, I should say.

Q. And how much lubricating oil?

A. 250 to 300 gallons a year.

Q. A year? A. Yes, sir.

Mr. FAULKNER.—That's all.

The COURT.—What boat were you—

The WITNESS.—(Interrupting.) The "Pacific."

The COURT.—Owned the boat "Pacific."

Cross-examination.

(By Judge WINN.)

Q. Were you in the courtroom when Mr. McBride testified?

A. I came in two or three times, but I didn't hear much of the trial.

Q. Were you here when he testified regarding any verbal agreement he had with you with reference to the launch "Pacific"? A. No, sir.
[323]

Q. Your verbal conversation that you had with Mr. McBride to furnish the launch "Pacific" oils and lubricating oils, took place first in 1914 or 1915?

(Testimony of C. E. Tibbits.)

A. I think it was right after they built the dock, after they got the oil and started to sell oil.

Q. When was that? A. That was in 1915.

Q. Where was it you had this first conversation?

A. In the office in Juneau here, at the C. W. Young Company's office.

Q. And you spoke to Mr. McBride and told Mr. McBride that if he could procure the oil from the Union Oil Company, that you would take, for the years of 1915, 1916 and 1917 fully 5,000 gallons of each one of the, each year of the refined oil and 250 gallons for each of those years of lubricating oil?

A. No, no, sir; I didn't state it that way. I stated that I would take oil from him, from his company—take all the oil that I could use from his company if he would furnish me.

Q. If he would furnish it to you? A. Yes, sir.

Q. There wasn't any specific gallons mentioned then, as to what you would take? A. No, sir.

Q. To Mr. McBride or the C. W. Young Company.

A. No, sir; just what I would require for use on the boat.

Q. How many times in 1915, 1916 and 1917—separate the years as well as you can—was there that you called upon the C. W. Young Company or the Union Oil Company dock to get oil for the launch "Pacific" that you didn't get? [324]

The COURT.—You better separate each year.

Q. All right, I'll commence first with— I'll withdraw the question. How many times during

(Testimony of C. E. Tibbits.)

the year 1915 did you call on Mr. McBride or the C. W. Young Company to get refined and lubricating oil that you didn't get?

A. I couldn't say how many times.

Q. You couldn't.

A. I went there on several occasions and they were out of oil and I went elsewhere for it.

Q. You don't remember during the year 1915 how many times you called or how much oil at each time it was that you needed, at any particular date that you called for the oil?

A. No; I couldn't state just the amount that I required each time. I would usually take three or four hundred gallons at a time, each time that I called. Sometimes, in towing, I would take a couple of drums on extra—take seven or eight hundred gallons.

Q. I don't care what you would take. I am asking you about the times that you called that you didn't get oil. You don't remember at those particular times how much oil you needed?

A. No, I could not say.

Q. That's 1915.

A. 1915, 1916 and 1917 I got oil from them whenever I could get it and it was convenient, I would go and get it; but I was taking all my oil from them.

Q. I can't understand you quite. I asked you about 1915. But would your testimony in respect to 1916 and 1917 be the same as your testimony, the same as the testimony you have given for 1915?

A. Yes, sir. [325]

(Testimony of C. E. Tibbits.)

Q. So in neither of those years, 1915, 1916 and 1917, do you have any particular recollection as to how much oil it was that you would call for that you couldn't be supplied with; that is the number of gallons of lubricating and refined oil?

A. No, I can't say the exact number of gallons offhand.

Q. Who did you have these conversations with about asking for oil during the years of 1915, 1916 and 1917? Was it with Mr. McBride or was it somebody else?

A. Well, I made the arrangements with Mr. McBride to take what oil I required from his dock, and when I went for the oil the wharfinger or the man in charge would inform me that they couldn't supply it and I had to go elsewhere to get it.

Q. When did you make these arrangements with Mr. McBride, in 1915? A. 1915; yes, sir.

Q. You remember what date?

A. No; I couldn't say, but just as soon as they commenced to handle oil.

Q. You remember the month?

A. I think it was early in the spring of 1915. I couldn't say just when it was. I know when they started to handle oil, I went to them and told them I would like to take oil from them.

Q. What do you mean by handle oil?

A. I mean selling oil on their dock.

Q. You mean by handling oil when they began

(Testimony of C. E. Tibbits.)

to sell oil at what Mr. McBride has referred to as the Union Oil dock?

A. Yes; the reason that I wanted to use that oil was because I got better results—[326]

Q. I don't care about your reasons. But I mean you refer to the dock that is between here and Thane which was termed then the Union Oil dock and which now has a cannery on it. That is the place you would call to get the oil? A. Yes, sir.

Q. But you only had this one conversation with Mr. McBride about obtaining oil from him and that was in 1915?

A. Yes, sir; although I spoke to him several times about not being able to get oil from him and the fact that they were out of oil when I called for it, and I was obliged to get it elsewhere.

Q. How many times did you speak to him, Captain, do you know?

A. Well, I mentioned that fact to him probably a couple of times afterward.

Q. A couple of times in 1915?

A. Well, during 1915, 1916 and 1917, while they were in business.

Q. As you have stated before, Captain, you could not tell the jury as to how much oil, in the aggregate, it was, covering these years that you have just mentioned that you called for and couldn't get—the number of gallons?

A. No, I could not. I figured that I was using—

Q. (Interrupting.) Well, you couldn't state the amount. That's all I want. Now, then, you did,

(Testimony of C. E. Tibbits.)

during those years, have a contract with the Standard Oil Company to get oil?

A. I had a contract with them, I think, in 1914—

Q. Uh-huh.

A. (Continuing.) is when the contract was.

Q. Well, that contract still continued during the years 1915, 1916 and 1917? A. Well— [327]

Q. Didn't it?

A. I couldn't say. I don't remember whether it did or not. I don't think it continued. I think that as soon as I got oil from elsewhere that that terminated the contract.

Q. That would be your opinion. You did get oil there, though, in 1915, 1916 and 1917?

A. Yes; I was obliged to get oil there.

Q. You know Mr. Helps, don't you?

A. Yes, sir.

Q. He was representing the Standard Oil Company at that time and still representing it?

A. I believe so.

Q. Both of these companies were selling oil at the same price? A. Yes, sir.

Judge WINN.—That's all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Those contracts you mentioned, with the Standard Oil Company, what was the nature of those, if you remember?

A. I believe it was that I could get oil for half a cent a gallon less by taking my oil from them exclusively.

(Testimony of C. E. Tibbits.)

Q. Yes. A. Yes, sir.

Q. And if you bought it elsewhere—

A. (Interposing.) That terminated the contract.

Mr. FAULKNER.—That's all.

Recross-examination.

(By Judge WINN.)

Q. You had the same sort of contract with the Union Oil Company? [328]

A. No; it was a verbal contract. I got the oil at the same price, though.

Q. And with the Standard Oil Company you had a written contract? A. Yes, sir.

Judge WINN.—That's all.

Adjournment taken until 2 P. M.

Court met pursuant to recess at 2 P. M.

Testimony of Earle L. Hunter, for Defendant.

EARLE L. HUNTER, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Hunter, will you state your name?

A. Earle Hunter.

Q. Where do you live? A. Juneau.

Q. How long have you lived in Juneau?

A. About 22 years.

Q. Were you living in Juneau in the years 1915, 1916 and 1917?

A. Well, my home is here. I was out and in here.

(Testimony of Earle L. Hunter.)

Q. Where were you—what were you doing those years? A. Operating gas boats.

Q. How many boats? A. Four.

Q. Alone or in connection with—

A. (Interrupting.) No; Mr. Dickinson and myself.

Q. Did you use refined oil and lubricating oil in the operating of those boats?

A. Yes, sir. [329]

Q. Did you ever order any of those oils from the C. W. Young Company—Union oils? A. Yes, sir.

Q. Did you ever order any oils during those years from the C. W. Young Company that they couldn't supply? A. Yes.

Judge WINN.—We make the same objection that we have to all this class of testimony, without repeating the objection.

The COURT.—Objection overruled.

Q. What quantity, Mr. Hunter, for each of those years? A. Beg pardon?

Q. What quantity for each of those years?

A. In what way?

Q. What quantity did you order that you couldn't get?

A. Well, during the year, I should judge, we would burn somewhere over 5,000 gallons, possibly, of distillate.

Q. And how much lubricating oil?

A. Oh, probably 250, 275 gallons.

Q. For each of those years?

A. For each of those years; yes, sir.

(Testimony of Earle L. Hunter.)

Q. Do you know why you couldn't get it?

A. Yes, sir.

Judge WINN.—Object to it, as irrelevant and immaterial.

The COURT.—Objection overruled. The question calls for an answer of yes or no.

A. (Continuing.) A shortage in their stock.

Judge WINN.—Well, he didn't answer it yes or no.

The COURT.—You know why you didn't get it?

Q. Just answer that yes or no. A. Yes. [330]

Q. Why?

Judge WINN.—The same objection. Calling for a conclusion of the witness, incompetent and immaterial, in addition to the other objections I have offered to this class of testimony.

Q. Why?

A. Because he didn't have it in stock.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Judge WINN.)

Q. You and Jack McBride have been pretty warm personal friends during all these years, haven't you, Earle? A. Yes, sir.

Q. In 1915 what boats were you connected with?

A. 1916.

Q. Oh, that's the first?

A. 1916 was the first that I was connected with boats; that is at that time— I had been personally connected with boats, but with this same Hunter &

(Testimony of Earle L. Hunter.)

Dickinson Company, we operated the same boats in 1916, 1917 and 1918.

Q. Well, now, cut out the year 1918, because there is nothing in this case concerning that year. You had nothing to do with the buying of gasoline, either from the Standard Oil Company or the Union Oil Company during the year 1915?

A. No; I did not, personally.

Q. You had no personal dealings, conversations with Mr. McBride during the season of 1915?

A. Not that I remember of.

Q. It commenced in 1916? [331]

A. 1916, yes.

Q. Now, then, in 1916, what boats were you connected with or had any interest in, in the running and operation of them?

A. The "Iowa," "Grubstake," "Santa Rita" and "Querida."

Q. Which you and Billy Dickinson owned?

A. Yes, sir.

Q. Those three boats together? A. Four boats.

Q. Would you give us their names again?

A. "Santa Rita," "Grubstake," "Iowa" and "Querida;" "Q-u-e-r-i-d-a."

Q. It's spelled here "C-a-r-i-t-a."

A. No; that's another boat. That belongs to the sawmill.

Q. Well, now, you and Dickinson were engaged in running these boats that you have just mentioned for the years 1916 and 1917. Leave out the year 1918.

The COURT.—Why should he leave out 1918?

Judge WINN.—1918 is not claimed in this suit.

The COURT.—I don't know. The contract was continued until August, 1918, wasn't it.

Mr. KELLEY.—The bill of particulars, your Honor.

Judge WINN.—Bill of particulars. The prior complaint all sets forth 1915, 1916 and 1917, and the complaint corresponds with this amount that they are suing for.

Mr. FAULKNER.—That's true that the bill of particulars only covers those three years, but the testimony shows that the contract continued until August 24, 1918.

Mr. KELLEY.—There is no claim for damages.

Judge WINN.—No claim for damages in either one of the counterclaims or the bill of particulars for 1918. [332] There has been no evidence so far—

The COURT.—The contract provides that during the years of 1917 and 1918—

Mr. FAULKNER.—That is one affirmative defense.

The COURT.—You set forth in the complaint that this was sold during the years 1917 and 1918 and the first affirmative answer sets forth that during the period of that time that this default or breach of the contract occurred. So I think that your testimony on that—and it is also set forth that by mutual consent the contract of 1917 was con-

(Testimony of Earle L. Hunter.)

tinued until August, 1918, so I think that the testimony is material.

Mr. KELLEY.—We save an exception.

The COURT.—You may take your exception.

Q. I am asking you about the years 1916 and 1917 alone. Now, you had no conversation with Mr. McBride concerning the furnishing of any oil for 1916. In what time—

A. (Interrupting.) I didn't say that for 1916; I said 1915. You asked me that question.

Q. Well, you haven't said that you had any conversation with him at all about furnishing oil for 1915, had you?

A. No; you asked me and I said no.

Q. Well, that is what I say. The first conversation, I say, that you said you did say you had with Mr. McBride was in 1916?

A. Why, I think it was; yes. I don't know right now of any personal conversation with him, then, in regard to oil.

Q. Well, with whom did you have any personal conversation?

A. With the man on the dock that tended to the oil. I don't know who it was. I don't remember. [333]

Q. You don't remember the man? A. No.

Q. When was it you had the conversation with the man on the dock?

A. I couldn't tell you that.

Q. What dock do you have reference to?

A. The C. W. Young dock.

(Testimony of Earle L. Hunter.)

Q. Where is that?

A. It is down below the Standard Oil dock a short ways, between here and Thane, about a mile and a half outside of Juneau.

Q. That has been referred to in various ways, Mr. Hunter, in this case. Sometimes it was said that it had a sign of the Union Oil Company on it and now it has got a cannery on it. Is that the dock you mean?

A. Well, it used to have a sign on it—Union Oil Company—right on the roof.

Q. And now has a cannery on it? A. Yes, sir.

Q. That is the dock you have reference to?

A. Yes, sir.

Q. Between here and Thane and below the Standard Oil Company's dock? A. Yes, sir.

Q. Well, do you remember the name of the party that you had the conversation with about obtaining oil in 1916, or do you remember the time?

A. No; I don't.

Q. Where was that? A. Where?

Q. That you had the conversation. [334]

A. I don't remember that there was any special conversation. If you would go up to the dock and couldn't get oil, you would go away; go somewhere else.

Q. What boat was you on yourself, during that time?

A. I was on the "Querida" and I was on the "Iowa" and I was on the "Grubstake" personally.

Q. You weren't on all three at the same time?

(Testimony of Earle L. Hunter.)

A. No; different times. I couldn't very well run them all at once.

Q. Well, let's take the first one—the "Querida"—how many times did you go up to that dock with the "Querida" in 19—

A. (Interrupting.) I wouldn't venture to say.

Q. And you don't know how many gallons of oil it was that you went in there to get with the "Querida" in 1915, that you desired to get and that they couldn't furnish?

A. I should judge, for all the boats that it would be somewhere around a little over 5,000 gallons.

Q. Now, you say, "you should judge." Let me get you down to brass tacks, Mr. Hunter. Do you remember, and can you state to this jury, the number of gallons that you went in there to get of that oil at any particular time on the "Querida" in 1915 and ordered put aboard that boat?

A. And ordered put aboard?

Q. Of either lubricating oil or gasoline or both?

A. No, I wouldn't say that I could remember any distinct time that I put oil aboard the boat. I put it aboard so often that it was an everyday occurrence.

Q. I didn't ask you how many times you put it aboard the boat. I asked you how many times would you come in there in 1916 with the "Querida" and ask for oil that you couldn't get. [335] How many gallons each time would you ask for? I don't want your judgment. I want you to tell me positively. A. I wouldn't answer that, Judge.

(Testimony of Earle L. Hunter.)

Q. You talked with some man on the dock?

A. The man that had charge of the dock.

Q. Do you remember his name? A. No, sir.

Q. Is he here now or not?

A. I couldn't say whether he is or not.

Q. None of those conversations were had with Mr. McBride.

A. They might have been up in the store. We probably talked it over in the store afterwards. I wouldn't say for sure.

Q. I don't want any mights or probabilities. I want positive testimony. Did you talk this over with Mr. McBride or did you not?

A. Not that I remember of.

Q. Now, then, during 1916, what other boats was you on that you went into the Union Oil Company dock, or the C. W. Young Company's dock, for oil?

A. Besides the "Querida?"

Q. Yes, sir. A. On the "Iowa."

Q. How many times did you go in there with the "Iowa" during 1915?

A. I wouldn't say how many times.

Q. You never had any talk with Mr. McBride about getting any oil for the "Iowa," did you, for 1915?

A. I possibly had, but I don't remember the exact dates or the time.

Q. Well, you say, you possibly have. Could you be positive one way or the other whether you did have such a conversation? [336] We don't want any probabilities or possibilities.

(Testimony of Earle L. Hunter.)

A. Well, if I would answer that I was positive, I would have to give the date, and it would be impossible to remember the date.

Q. How many times did you go there with the "Iowa"? Or, do you say you don't remember?

A. I don't remember.

Q. I'm confining it to 1915. A. 1916.

Q. 1916, I mean; yes. And you couldn't tell to the jury how many times you went in there with the "Iowa" in 1916 and asked for any given quantity of gasoline or refined oil, or lubricating oil?

A. No; I wouldn't make any definite statement as to the amount in that regard.

Q. Now, on what other boat, if any, did you go into this wharf with, during the year of 1916?

A. "Grubstake."

Q. Well, how many times did you go in there with the "Grubstake," do you remember?

A. I wouldn't state how many times.

Q. Do you know how many gallons, either of refined oil—that is, gasoline—that furnishes power and— A. (Interrupting.) And distillate.

Q. Yes; and distillate, or lubricating oil, you don't know the number of gallons that you ordered there during nineteen hundred and—

A. (Interrupting.) I wouldn't make any definite statement as to any one certain time now: [337]

Q. You don't remember how many times you went in there with this last boat called the "Grubstake"? A. No; I don't.

(Testimony of Earle L. Hunter.)

Q. Any other boat that you went into this dock with in 1916?

A. I never happened to be on the "Santa Rita" when she was in there for oil.

Q. Huh?

A. I say I never happened to be on the "Santa Rita" when she went in there for oil. Billy was always on her.

Q. So, so far as the "Santa Rita" was concerned in 1916, you have no personal knowledge of any matters concerning—

A. (Interrupting.) I had personal knowledge through Mr. Dickinson.

Q. Do you call that personal knowledge?

A. Why, I would think so—partners.

Q. Do you know of your own self, except what somebody told you anything about what took place aboard this boat "Santa Rita"?

A. No; not at that time; no.

Q. No. Just what somebody else told you.

A. Well, of course, we paid the bills and we knew where the bills came from.

Q. Where are the bills?

A. We never saved the bills.

Q. Got none now? A. No.

Q. Well, you didn't pay any bills for oil you didn't get? A. No, no; but I say—

Q. (Interrupting.) Well, I'm asking you about oil you didn't get. You don't know, except through hearsay what oil it was [338] that the "Santa Rita" went in there for in 1916—

(Testimony of Earle L. Hunter.)

A. (Interrupting.) No; that's all.

Q. Only through hearsay. Now, in 1917 what boats were you connected with during that year?

A. The same as before.

Q. The same as before.

A. I think in 1917 that we turned the "Grubstake" over to Mr. Bayers, if I remember rightly.

Q. You named the four boats that you had in 1916? A. Yes, sir.

Q. "Santa Rita," "Grubstake," the "Iowa" and the "Querida." You were on those same boats during the year 1917?

A. Yes; I don't remember just what date—it was during the year 1917 some time—that we turned the "Grubstake" over to Mr. Bayers and he used her. We still owned her, though.

Q. Tay Bayers? A. Yes.

Q. You don't remember what time in 1917?

A. No; I don't remember the dates; no, sir.

Q. Well, how many times did you go in there yourself on the "Querida" in 1917 and ask for oil and didn't get it? A. I wouldn't say.

Q. Huh? A. I wouldn't say.

Q. And you couldn't say, Earle, as to the number of gallons that you used on her?

A. No; I wouldn't say as to that.

Q. Well, how many times did you go in with the "Grubstake"?

A. I didn't go in at any time with the "Grubstake" during 1917, personally. [339]

(Testimony of Earle L. Hunter.)

Q. You don't know anything about the "Grub-stake" except what somebody else would tell you?

A. No.

Q. Of course, the actual oil that you did get and paid for it, you know about that? A. Oh, yes.

Q. But not what you didn't get.

A. Well, I know about it in a way. I wouldn't remember about it now.

Q. Well, you knew of course, what you paid for. Well, was there any other boat that you went in there in 1917 on?

A. Yes; I went in on the "Querida."

Q. Well, how many times did you go in there?

A. I wouldn't say as to that.

Q. Nor you wouldn't say how many gallons you asked for and how many you missed getting? A. No; I wouldn't say as to that.

Q. What other boat in 1917?

A. I didn't go in on any other boat in 1917.

Q. Just these two. A. That is all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Hunter, in 1915 who had charge of these boats? A. Mr. Dickinson.

Q. Did you have a company known as the Gastineau Transportation Company?

A. The Gastineau Transportation Company.

Q. What were you doing in 1915? [340]

A. I was in the postoffice.

Mr. FAULKNER.—That's all.

Judge WINN.—That's all.

Testimony of H. G. Bayers, for Defendant.

H. G. BAYERS, called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. State your name, please?

A. H. G. Bayers.

Q. B-a-y-e-r-s? A. Yes, sir.

Q. Mr. Bayers, where do you live?

A. Juneau.

Q. How long have you lived in Juneau?

A. 19 years.

Q. Were you living in Juneau in 1916?

A. Why, no; I was living at Kake. I used to go out in the summer.

Q. In what business were you in Kake?

A. In the fish business.

Q. Did you have any boats? A. Yes, sir.

Q. How many? A. I had one.

Q. Did you order any oil in the year 1916 from the C. W. Young Company? A. Yes, sir.

Q. How much oil did you order from them?
[341]

Judge WINN.—We object, if your Honor please. We urge the same general objection that we have made to all this class of testimony all the way through, and furthermore, this boat and Mr. Bayers

(Testimony of H. G. Bayers.)

are not contained in the bill of particulars which this action and claims are predicated upon.

The COURT.—Objection overruled.

Judge WINN.—And for the further reason that it appears now that this is the same Mr. Bayers that they offered those letters from in evidence; offered them in evidence in this case, and which was refused by the Court on the ground that the objection we had raised at that time pertained to subcontract matters, or a subagent, which is not contemplated in the contract of either 1915 or 1916, if those contracts existed as is contended for by the defendant in this case.

The COURT.—Objection overruled.

Q. Mr. Bayers, did you order some oil from the Union Oil Company in May, 1916? A. Yes, sir.

Q. How much? A. 5,000 gallons.

Q. Did you come to the C. W. Young Company's dock to get that oil? A. I did.

Q. Did you get that? A. No, sir.

Q. You know why you didn't get it?

A. Well, they told me that they didn't have the oil.

Q. Now, did you order any other oil from the C. W. Young Company during that year? [342]

Judge WINN.—The same objection that we made to the last question, without repeating it.

The COURT.—Objection overruled.

Judge WINN.—Comes directly under that sub-agency proposition.

(Testimony of H. G. Bayers.)

Q. Did you order any other oil besides this 5,000 gallons?

A. Yes; I wrote him a letter and asked him if he could—

Judge WINN.—Now, wait; wait.

Q. Just state whether you ordered any oil?

A. Yes.

Q. For what was that oil? For what purpose was that oil?

Judge WINN.—Object to it. The letter would be the best evidence. He said he wrote him a letter.

The COURT.—He hasn't stated that this order was subsequent. As I understand it, he said he wrote the letter, then he stopped.

Q. Did you order any other oil besides the 5,000 gallons? A. Yes, sir.

Q. When was that?

Judge WINN.—Well, now; that's the same question again.

The COURT.—He's simply repeating it. Answer it.

A. That was the last of May.

Q. Was that ordered by letter? A. Yes, sir.

Q. Altogether by letter.

A. He told me to come to town; that when I came in he would try to fix me up.

Q. Did you come to town? A. Yes, sir.

Q. How much oil did you want? [343]

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

(Testimony of H. G. Bayers.)

Q. How much oil did you want at that time?

A. I wanted four cases— I came in with the boat and I wanted some case gasoline.

Q. Did you get it? A. No, sir.

Q. Not at that time—don't answer this question. Judge Winn may want to object to it. At that time, did you make any arrangements with Mr. McBride or conduct any negotiations with him regarding his furnishing you, through the C. W. Young Company any more oil in 1916?

A. Yes, sir.

Judge WINN.—Well, we make the same objection to that. That would go to the subagency matter again. I wish Mr. Faulkner would be direct with his question so that I could ascertain just what he is driving at. At the present time I, of course, have to urge my objections.

Mr. FAULKNER.—I can only ask him one question at a time.

Judge WINN.—That might go to the subagency matter or it may be to him personally.

Mr. FAULKNER.—I was just about to ask him that.

The COURT.—You may proceed.

Q. For what purpose was that oil to be used, Mr. Bayers?

Judge WINN.—The same objection, if your Honor please.

The COURT.—Objection overruled.

Judge WINN.—He is testifying on this subagency.

(Testimony of H. G. Bayers.)

The COURT.—Well, I don't know that it is a subagency.

Judge WINN.—Well, I don't know, but I want to preserve my objection so that if it develops to be, I can move to strike [344] it out.

Q. For what purpose were you to get that oil?

A. To supply my fishermen.

Q. Where? A. At Kake.

Q. Now, how much did you order at that time?

A. I don't remember just how much.

Q. Well, have you got any estimate of it, or round numbers, in your head?

Judge WINN.—I object to it, if your Honor please, about his estimates. May I ask him whether or not these orders were in writing or letters, so we can cut the evidence?

The COURT.—No; not yet. He can answer and then you can move to strike it out afterward, if it is for a subagency, because under the contract, he is not allowed to enter into a subagency.

Judge WINN.—Well, then, I object to the estimates.

The COURT.—He may answer.

Q. You know, Mr. Bayers, how many gallons of oil you ordered?

A. I think I wanted fifty cases of gasoline and some cylinder oil; a barrel of cylinder oil.

Q. How much distillate.

A. Not any distillate.

Q. Did you, at any time during the period I have

(Testimony of H. G. Bayers.)

mentioned, order any further oil or gasoline from Mr. McBride or the C. W. Young Company?

Judge WINN.—The same objection, if your Honor please.

A. No, sir.

Q. And you say you wanted that for the purpose of supplying the fishermen? [345] A. Yes, sir.

Q. In what business were you engaged?

A. I was buying King salmon for salting and mild curing.

Q. Did you get any of this oil? A. No, sir.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Judge WINN.)

Q. Mr. Bayers, you started to answer Mr. Faulkner's question at one time—you started to state to Mr. Faulkner that some of these orders that you had were in writing, by letter, is that true?

A. Yes. No; I wrote and asked him—

Q. Wait; wait; wait. I don't want what you wrote. Some of those orders were in writing, were they? A. No, sir.

Q. Well, you wrote a letter about some of those orders, didn't you?

A. Yes; and he advised me to come to town and see him personally.

Q. Oh, he wrote you a letter? A. Yes, sir.

Q. To come to town and see him personally?

A. Yes, sir; and I did so.

Q. When was that that he wrote you that letter?

A. In May.

(Testimony of H. G. Bayers.)

Q. What year? A. 1916.

Q. Where is the letter?

A. I have no letters now. [346]

Q. He wrote it to you? A. Yes, sir.

Q. You have lost or misplaced it?

A. I never—

Q. Have you?

A. Yes; I must have lost it. I haven't got it.

Q. Some time in May, 1916? A. Yes, sir.

Q. Then in pursuance of the letter that was written to you by McBride, you came to town?

A. Yes, sir.

Q. Then you met McBride? A. Yes, sir.

Q. Where did you meet him?

A. In his office; the C. W. Young Company.

Q. What conversation did you have with McBride at that time?

A. I told him that I would like to buy all the oil we used from him if he could furnish it to me.

Q. That you would like to buy all the oil that you used from him. What did he say to you about that?

A. Well, he said that he would do the best he could; that he would like to have my business if he had the oil; that he would be glad to furnish me with the oil to take care of my fishermen.

Q. Told you that if he had the oil he would furnish it to you? A. Yes, sir.

Q. He was doubtful about whether he would have it or not? A. He was.

(Testimony of H. G. Bayers.)

Q. You was running one boat? A. Yes, sir.
[347]

Q. You couldn't estimate at that time what amount of oil you would need for the years 1915, 1916, could you? A. I was selling oil—

Q. (Interrupting.) How?

A. I was selling oil to my fishermen on the scow.

Q. You was buying some of this oil particularly from Mr. McBride to sell to other parties?

A. Yes, sir; I had to have oil to supply my fishermen.

Q. And you sold it to them? A. Yes, sir.

Q. In other words, you bought from Mr. McBride at a certain price and then you took and sold it to other fishermen for another price?

A. Yes, sir.

Q. Certainly, to make up your freight?

A. Yes, sir.

Q. And you were acting somewhat as an agent, as between those fishermen and Mr. McBride, to furnish those fishermen with oil? A. No, sir.

Q. And with grease.

A. No, sir; I bought my oil just the same as any other boat would buy it. I had thirty to sixty days' credit.

Q. What I mean is this: that you were buying this oil to sell it to other people? A. Yes, sir.

Q. And that was the oil that you were buying for 1916? A. Yes, sir.

Q. Did any of— I'll withdraw that. Did you and McBride have any conversation as to specific

(Testimony of H. G. Bayers.)

amounts of refined oil, [348] specific amounts of lubricating oil which was to be furnished you for the year 1916, under this conversation or understanding that you speak of? A. Yes, sir.

Q. How much did you ask him for?

A. At one time?

Q. Yes, sir. A. Or for the season?

Q. For that one season. I'm confining it to 1916, now. A. I could handle 5,000 gallons—

Q. You could handle it, but I am asking you what agreement if any you had, or what was the conversation you had with McBride. State the conversation you had with Mr. McBride about the quantity and quality and the kind of oil that he was to furnish you.

A. He was to furnish me distillate and lubricating oil and gasoline, and I didn't know just exactly how much I would need, but I told him what I needed I would like to buy from him.

Q. And it was this you were buying to furnish these fishermen out near Kake? A. Yes, sir.

Q. They had gasoline boats? A. Yes, sir.

Judge WINN.—We move to strike out the evidence of this witness so far, for the period of 1916, for the several reasons that I have enumerated to this class of testimony before; and for the further reason that it appears now that this was a sub-agency, which is not contemplated by any of the contracts entered into, or claimed to have been [349] entered into between McBride and the Union Oil Company, and furthermore, that it isn't one of the

elements of damages which is asked for in the complaint in this case and not in the bill of particulars.

The COURT.—Objection overruled. It is not a subagency. A man who goes in and buys oil can do whatever he pleases with it after he buys it. He can turn it out on the ground and let it go away. He bought it.

Judge WINN.—The question that I wanted to present to the Court was this: whether that would be in the regular course of business?

The COURT.—Why, yes.

Judge WINN.—To establish a subagency?

The COURT.—Under the contract, it is alleged by the plaintiff in its complaint, that in 1916 the plaintiff was to furnish the defendant with all the oil that he could get orders for or dispose of. That is according to the allegations; and he alleges a different contract in 1915 and 1916.

Judge WINN.—I know there's two contracts.

The COURT.—Different contracts and expressed differently; and this comes under the 1916 contract.

Judge WINN.—Well, the only thing is this: I contend that the contract hadn't provided that he had a right to establish a subagency.

The COURT.—There is no subagency. If a man has bought his oil outright for himself and resells it to fishermen, there is no question of a subagency there.

Judge WINN.—Do I understand, if your Honor please—we have had this question up before, so it might shorten this up—of course, these matters are not included in the bill [350] of particulars.

Do I understand that these matters that are not included in the bill of particulars can be a subject matter of recovery in the case, or are they introduced for the purpose which your Honor indicated some time ago, during the trial?

The COURT.—Simply to show that the contract had been violated—that is the view I take of it—for not furnishing oil for all the requirements, under the first contract for not furnishing sufficient oil to meet the ordinary requirements of the trade. That is under the first contract, first cause of action; and under the second cause of action, for not filling the orders which Mr. McBride has set up under the alleged contract—not for the purpose of forming a basis for an estimate of damages.

Judge WINN.—That is what I thought.

The COURT.—That is the view I take of it. That is why I allowed all these outside matters to come in. There are several views we may take of these several contracts.

Judge WINN.—Yes, sir.

The COURT.—And I will allow the evidence to go in, and especially in view of the very peculiar way the pleadings are drawn in this case and the uncertainty, I'm rather free to allow the evidence to go in that I wouldn't otherwise allow if the pleadings were drawn with more exactitude.

Judge WINN.—I understand the situation. I ask for an exception, if your Honor please. I see
* your Honor's attitude in the matter.

Q. Now, Mr. Bayers, what was the name of the boat that you were operating yourself?

(Testimony of H. G. Bayers.)

A. "Elm."

Q. Gasboat? [351] A. Gasboat "Elm."

Q. What was the approximate size of it?

A. 36 feet long; about six tons.

Q. What horse-power? A. Fifteen.

Q. Engine? A. Yes, sir.

Q. Then, did you say that you had a lot of fishermen fishing for you that were using gasoline boats?

A. Yes, sir.

Q. You were taking the fish from those fishermen? A. Yes, sir.

Q. This oil that you spoke to Mr. McBride about, in 1916 or 1917, I think that is the year, was to supply those fishermen that were fishing for you?

A. Yes, sir.

Q. Were those small boats? A. Yes, sir.

Q. And there was no specific quantity or quality of oil, of lubricating oil, or was there a specific quantity, quality of oil and no specific quantity?

A. I estimated about what I thought I could handle, with six months to the fishing season. I told him I thought I could take care of about 5,000 gallons a month.

Q. That was simply an estimate of yours?

A. Yes, sir.

Q. And he said if he could get the oil, he would supply you with it? A. Yes, sir.

Q. Now, then, did he supply you with any of this oil? A. No, sir. [352]

Q. Didn't supply you with any of it at all?

A. No, sir.

(Testimony of H. G. Bayers.)

Q. That was for 1916? A. Yes, sir.

Q. Now, what kind of oil, did you say, or did you indicate to Mr. Faulkner, that it was to be—distillate? A. Distillate and gasoline.

Q. How? A. And gasoline.

Q. Call it gasoline and lubricating oil?

A. Yes, sir.

Q. There wasn't any turpentine or any oils of that kind? A. No.

Q. Just these two kinds?

A. Yes; distillate and gasoline.

Q. That was in 1916?

A. And lubricating oil.

Q. And lubricating oil. Well, how do you classify distillate as that?

A. That is a cheaper grade of—

Q. (Interposing.) Of gasoline? A. Yes, sir.

Q. That comes under the head of what is commonly called one of the grades of refined oil?

A. Yes, sir.

Q. That conversation was some time, you say, in May, 1916? A. Yes, sir.

Q. When did you come into Juneau in May, 1916, to try to get any oil from the Union Oil Company, through the C. W. Young Company and McBride?
[353]

A. Some time the first part of May. I don't just—

Q. How much did you want?

A. I wanted fifty drums. That's a hundred gallons—we figure a hundred gallons to the drum or a little over.

(Testimony of H. G. Bayers.)

Q. You didn't get any of it? A. No, sir.

Q. You got it from the Standard Oil Company?

A. I got some of it and I went to the Standard Oil Company and got what I could, because on my credit down at the Standard Oil Company, I couldn't get fifty drums at a time.

Q. Were you to buy this from Mr. McBride on time?

A. He gave me thirty to sixty days.

Q. You didn't pay him any cash down at the time that you had this conversation with him on the estimate of the amount of oil that you wanted or would want? A. No, sir; no, sir.

Q. And there wasn't any of the oil of the kind which you specified, that was ever delivered?

A. No, sir.

Q. By Mr. McBride or the C. W. Young Company? A. Not at that time.

Q. Well, what time, then, was it, during 1916?

A. Before and after that I used to oil my boat up when I was at the dock with my boat and needed oil, I would oil up. I done my business with the Union Oil and paid for my oil.

Q. Well, that was a cash deal? A. Yes, sir.

Q. That was aside from this other deal you had with him? A. Yes, sir. [354]

Q. Well, I don't care about that. But on this big order, you never got any? A. No, sir.

Q. Now, then, in 1917 what business were you engaged in? A. The same business.

Q. Running the same boats?

A. Let's see. I had two boats in 1917.

(Testimony of H. G. Bayers.)

Q. Two that you were running individually, yourself? A. Yes, sir.

Q. What were those boats?

A. The "Elm" and I had a seine boat we called the "Bullhead."

Q. What were you engaged in? What kind of business? A. Mild curing.

Q. What kind of business with those two boats?

A. Mild curing King Salmon.

Q. How? A. Mild curing King Salmon.

Q. Whom did you see or have any conversation about furnishing any refined oil or lubricating oil to you for the year of 1917?

A. Why in the meantime I had— There was a boat running from Petersburg and I had my oil shipped, when I found out that I couldn't get it on the mail boat, and I bought it from Steberg at Petersburg, the Standard Oil agent—most of my oil.

Q. During 1917? A. Yes, sir.

Q. Well, during 1917, Mr. Bayers, did you have any conversation at all with Mr. McBride, about his furnishing you with oil? [355] Of course, what I mean, when I ask about his furnishing you, I mean the C. W. Young Company, as he was acting for them. Did you have any conversation with him about furnishing refined or lubricating oil for the year 1917 to you?

A. Why, we talked it over down there and he wanted to know where I was getting my oil, and I told him when I was in town or came up this way,

(Testimony of H. G. Bayers.)

I would be glad to give him my business, if I had any.

Q. But you bought all the oil that season, though, at Petersburg? A. Yes, sir.

Q. Now, Mr. Bayers, you have run gasoline boats and are acquainted with gasoline engines and the usual amount of gasoline or distillate that kind of boat will usually consume during a season, and also about the necessary amount of lubricating oil which you may need for a boat. Can you put any estimate on what, say, a boat of the kind you had, either in 1915 or 1916, if you were running that boat alone, providing you kept on being engaged in business with that boat, how much gasoline and how much lubricating oil you would need for that boat alone?

A. I can come somewheres near it.

Q. What, approximately, do you think it would be?

A. She would burn two and a half gallons per hour.

Q. Uh-huh.

A. In the fishing season we run them generally twenty hours. When one man gets off another man would take them; so they would be running pretty near all the time.

Q. That would be approximately the amount of gasoline or distillate? [356] A. Yes, sir.

Q. That you would use and would—what would be the approximate amount of lubricating oil that you think it would take to run a boat of that size during that time?

(Testimony of H. G. Bayers.)

A. Well, that depends a good deal on what kind of machinery you have. Some of them take more than others. I think mine would take, maybe three or four gallons a day and night.

Q. The amount of gasoline, of course, that any boat would consume and the amount of lubricating oil could not be estimated accurately unless you knew the boat well, the engine and so forth?

A. Yes, sir.

Q. You could estimate it accurately?

A. No, sir.

Q. It would vary in different cases?

A. Yes, sir.

Q. You don't know how much these fishing boats would have consumed during the year of 1916?

A. Why no.

Q. You estimated it?

A. There was about eighty power boats that year.

Q. Eighteen power boats? A. Eighty.

Q. Oh, 80? A. Yes.

Q. About 80. Do you have as many as 80 fishing boats?

A. Why at times and sometimes more. We was prepared to take care of all the fish that we could get from the trollers. We were trolling with lines and nets. [357]

Q. Did you use power boats in trolling?

A. Power trollers; yes, sir.

Q. The amount of lubricating oil and the amount of gasoline that those boats use, the proportion, you couldn't very well estimate? A. No, sir.

(Testimony of H. G. Bayers.)

Q. Impossible for anyone to do so?

A. Impossible.

Q. Of course, it depends upon the run, depends upon the kind of machinery they got, the kind of engine they have, and the skill and so forth and so on of the parties who run and operate them?

A. Yes, sir.

Judge WINN.—That's all.

Mr. FAULKNER.—We now offer to read the deposition of James Davis.

Deposition of James V. Davis, for Defendant.

BE IT REMEMBERED That on the 19th day of January, 1922, before me, the undersigned, George W. Folta, a notary public in and for the Territory of Alaska, residing at Juneau, personally appeared before me, in the United States District Court at Juneau, Alaska, Mr. H. L. Faulkner, attorney for the defendant and Messrs. John R. Winn and L. C. Kelley, attorneys for the plaintiff in the foregoing cause. Thereupon said attorneys stipulated and agreed to take the deposition of JAMES V. DAVIS, a witness on behalf of the defendant, before me, waiving notice of taking and signature of the witness to same and agreeing that said deposition may be used on the trial of said cause by either party thereto. [358]

JAMES V. DAVIS, the witness named in the foregoing stipulation, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Deposition of James V. Davis.)

Direct Examination.

(By Mr. FAULKNER.)

Q. In what business are you engaged?

A. I'm engaged in the operation of the motor vessel "Estebeth."

Q. What do you do with that vessel?

A. Haul mail, passengers and freight between Juneau and Sitka and way ports and Juneau and Skagway and way ports.

Q. How long have you been operating that ship?

A. Four years and a half.

Q. Were you in the same business prior to that time, in the years 1915, 1916 and 1917?

A. 1915, 1916 and 1917 I was operating the gas boat "St. Nicholas."

Q. On the same route?

Judge WINN.—What boat, Jim?

A. "St. Nicholas."

Q. What business were you engaged in?

A. I was operating two years between the towns of Juneau and Tenakee and then I did jobbing and charter work between trips to fill out the week, and in—that was in 1914 and 1915—and in 1915, 1916 and 1917, I operated her as a tow boat, and through the latter part of that year, from July till December, in 1917, I ran down as far as Port Alexander on Chatham Straits, making way ports under contract with the Juneau Merchants' Protective Association.

Q. Now, during the years 1915, 1916 and 1917 did you order any—[359]

(Deposition of James V. Davis.)

Judge WINN.—Object. Subject to the same objection; speculative, remote and uncertain. This is not one of the parties included in the bill of particulars, and on that ground and in connection with the other objections we have heretofore made, we object.

The COURT.—Objection overruled.

Judge WINN.—We ask for an exception to the ruling of the Court.

A. I bought oil from the C. W. Young Company; that is, it was known as the Union Oil Company, on various occasions; that is, distillate and lubricating oil—very little gasoline though.

Q. Did you go there for distillate and lubricating oil during the years 1915, 1916 and 1917 when you couldn't get any oil? A. Yes.

Judge WINN.—We object to that question as being leading, in addition to the other objections that we may raise under our stipulation.

The COURT.—Objection overruled.

Q. All right. Did you give orders for oil there which could not be filled during those years?

Judge WINN.—What was the question?

Mr. FAULKNER.—I asked him, did he have orders there which could not be filled.

Judge WINN.—Did *he* have orders?

Mr. FAULKNER.—Yes.

A. You mean that couldn't be supplied?

Q. Yes; orders that could not be supplied.

A. Yes. [360]

(Deposition of James V. Davis.)

Q. What would be the approximate amount for those years, 1915, 1916 and 1917 that you would have bought, but that you could not obtain?

Judge WINN.—Why, of course, we object to that question, especially as being indefinite. It's only giving an estimate.

The COURT.—Objection overruled.

A. I didn't quite get your question.

Q. What would be the approximate amount of oil in those three years, 1915, 1916 and 1917, that you ordered from the C. W. Young Company where the orders could not be filled?

Judge WINN.—And also further that it is in violation of the bill of particulars that has been furnished in this case; and that they can neither add to or take from the amount of oil that is stated in there that he may have ordered. Now the approximate amount, if your Honor please, I don't think would be anything which the jury could base a judgment on, even if the other objections are not well taken.

The COURT.—Objection overruled; not the basis for computation of damages upon that view of it. The other view of it is that the contract was being breached.

Q. What would that amount to?

A. That would be hard for me to say.

Q. Well, approximately?

A. That I ordered, that couldn't be supplied?

Q. Yes.

(Deposition of James V. Davis.)

A. I talked it over with Jack McBride one day and promised him that if he could supply my complete wants, I would buy my oil from him, and I went down there one day to oil up, when I went on the tow boat. I had a job that took me out for [361] about ten days, and I wanted to fill the hold of the vessel with drums of oil to use on the trip. My tank would not hold enough and I wanted to get some drums so as to be sure to have enough to last me until I got back, and he couldn't supply me with more than one-half the oil that I wanted. He said, "I'll have more when you come back," and I said, "I've got to have more or I can't get back." I told him that he had promised me that he would supply me with all the oil I wanted, and I neglected to sign up my agreement with the Standard Oil, and I said, "If you can't supply me with all the oil that I've got to have, I'll have to go and get it where I can." So I left the dock and went down to the Standard Oil and took plenty of oil aboard and didn't go back there for any more oil afterward.

Q. What is the approximate amount that you would have taken if he could have supplied you during those three years?

Judge WINN.—Wait; wait; wait. As I understand it, you went there once and couldn't get oil and then you didn't go back again?

A. I went there that time, but when I couldn't—when he fell down on his agreement, I didn't go

(Deposition of James V. Davis.)

back after any more oil. I went over and signed up with the Standard.

Judge WINN.—And you didn't go to McBride but the once and he couldn't supply you with oil and then you went over to the Standard Oil.

A. I couldn't say, covering a period of three years. I know that during this particular year I went there, and I haven't looked back over any of my records to see. I couldn't tell whether I supplied there or not afterwards, but I'm pretty [362] much, pretty strongly of the opinion right now that I didn't go back after that and ask him for any more oil.

Q. What amount of oil could you have taken, or would you have taken if you had been supplied from there during those three years?

A. My yearly supply amounted to between fifteen and eighteen thousand gallons of distillate and about, probably a barrel and a half a month or so of lubricating oil.

Q. How much would be in a barrel?

A. About fifty-four gallons—52, 54.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Judge WINN.)

Q. Where did you have your conversation with McBride and who was present, about getting this oil that you didn't get?

A. About getting the oil that I didn't get?

Q. Yes.

(Deposition of James V. Davis.)

A. Why, Mr. McBride called me into the office of the C. W. Young Company and informed me that he had an agency for the Union Oil Company oil and was going to put in floats and water and all the accommodations both necessary and comfortable for gas boats down at his dock—they called it the Union Oil dock at that time—but that at that time he was fixing it up and wanted to know if he could depend on me for a regular and steady customer. I told him he surely could; that if he would give me Union oil at the same price that the Standard Oil was selling for, that he could depend on me for my complete wants. And he built a dock and tanks there and shipped his oil up in drums, and emptied it into [363] the tank with a sort of hoist rigging he had there.

Q. What year was that that you had that conversation with him?

A. I think that that was in 1915, I believe.

Q. When was that dock built down there, do you know?

A. Called the Union Oil Company dock? I don't know. There was a dock down there, sort of a dock, small dock, for quite a number of years, and I think he enlarged and improved it either in 1914 or 1915. I am not certain about that.

Q. You don't remember?

A. No. However, I'm confident that he had a dock completed and in operation in 1915.

Q. What part of 1915 was it that you had this

(Deposition of James V. Davis.)

conversation with Jack McBride, do you remember, Jim?

A. I think it was about—it was in the spring or early part of the summer.

Q. You couldn't designate the month?

A. No; I couldn't say just what month.

Q. This is all the conversation you had with him?

A. Sir?

Q. I say, is this all the conversation you had with him. Is this the only conversation you had with him?

A. No; I had a conversation with Jack McBride every time I ever met him.

Q. Yes, I know, but I mean the conversation that you have just given pertaining to the oil and the time that he refused the oil or didn't have it to give to you rather, and then you went off and signed up with the Standard Oil Company. When was that, do you know?

A. No; I can't say for sure, Judge; I don't know.
[364]

Q. Did you have a written contract with the Standard Oil?

A. No; we never had any contract—what you'd call a contract. They give you, just write out a form of an agreement to supply you with a certain number of gallons of various grades of oil, or kinds of oil, for a period of one year.

Q. At certain prices?

A. No; not at certain prices; say, a cent off the market.

(Deposition of James V. Davis.)

Q. Is that the kind of agreement that you got with the Standard Oil?

A. That is the kind of agreement; that is the only kind of agreement I could get from the Standard Oil—a consideration of a cent below the market for letting them tell me what they would supply me for a year for. I never considered that was a contract. I never was bound by it in any way.

Q. When was this, if you remember, that you had this agreement with the Standard Oil, Jim?

A. Why, I think there was one in force, one of these agreements, or whatever you would call them, at the time the Union Oil started in business down there. In fact, I think I was working under one of those myself most of the time.

Q. With the Standard Oil Company? A. Yes.

Q. The fact is that you did have an outstanding contract signed up there with the Standard Oil Company, even at the time that you took some from Jack?

A. No; I stated that I never had a contract signed up or outstanding with the Standard Oil Company. I stated that all that I have ever been able to get from the Standard Oil is a statement or agreement by them that they would give me [365] a half a cent or a cent off the market, whichever the case might be, on all the oils that I would purchase from them, and that they would agree to supply me with a certain amount a year. I wasn't bound to take that amount or any part of that amount.

(Deposition of James V. Davis.)

Q. Gave you that in writing and sent it to you through the mail, or handed it to you?

A. They handed it to me.

Q. You didn't sign it?

A. Oh, yes; I signed it.

Q. Did you have the same sort of paper with McBride? A. I did not, but you see—

Q. (Interrupting.) Was McBride selling at the same price that the Standard Oil Company was?

A. Yes; he was, including the same—

Q. (Interposing.) Including the same discount?

A. The same discount; yes, sir. You see the agreements, as I remember them, was this: I don't know just what you would call them—

Q. (Interrupting.) Well, paper writing. I don't care what you call it.

A. Well, anyway, it was dated along about May or June, was when the agreement would start, and terminated at the same time in the year.

Q. With the Standard Oil Company?

A. With the Standard Oil Company.

Q. What year?

A. Every year I ever had it. They naturally expire about the same time every year, about the first of May, or so. [366]

Q. You had one in 1915, didn't you?

A. I'm not sure. I believe I did.

Q. In 1916 and 1917?

A. I couldn't tell for sure, although there would be a copy on file. I could look that up.

Q. Have you got a copy of it?

(Deposition of James V. Davis.)

A. No, but if I haven't the Standard Oil Company will.

Q. They would give you a copy and keep a copy?

A. Certainly.

Q. You don't know whether you got your copy or not?

A. No; I don't believe I have my copy, but I am sure that the Standard Oil would have theirs.

Q. Do you remember what date it was that you went back to the Standard Oil Company? As I understand it, before you took these orders to McBride, as the agent of the Union Oil Company, you had been getting some oil from the Standard Oil Company and then you took some from Jack, and then you went back to the Standard Oil Company. Do you remember what time it was that you went back to them, Jim? A. No.

Q. After you couldn't get it from him?

A. No; I don't remember that.

Q. What year and month?

A. You see— Of course, that question covers a lot of territory. When you say, when did I quit the Standard and come to McBride for oil, well, I had always dealt with the Standard Oil, because they were the only people in the field, and I bought oil from Worthen when he was the Union Oil Company's agent. The business was practically open to anybody [367] that wanted it, and I believe that that contract or form of agreement that the Standard Oil people were signing up, I don't believe they had one of those in existence until after

(Deposition of James V. Davis.)

McBride took the agency for the Union Oil Company oil.

Q. What I meant was this: You testified, and Mr. Faulkner asked you—so as to draw your attention to the particular thing we want to get at—that at one time you went to McBride and you couldn't get any oil from him and then you went over to the Standard Oil Company and after that you got oil from the Standard Oil Company. Do you remember approximately the year and the date that you did that? That is what I was trying to get at.

A. Let me see. I'll have to review a little on that.

Q. Was it 1915, 1916 and 1917?

A. I started here in 1914 with the "St. Nicholas," and at that time neither the Union nor the Standard had regular stations here, but it was about fifty-fifty between the Union Oil and Standard Oil, from Worthen and Henry Shattuck. Then in 1915, I think, it was, the Standard Oil Company put in supply tanks, and shortly after they were in a position to deliver oil, McBride put tanks down there and started delivering oil for the Union Oil Company. Now, whether it was in the spring or summer of 1915, or 1916, I am not certain. I know it probably was in 1916, because in 1916 was the season that I was towing logs constantly. Of course, I had towed some in 1915, so it may have been then. That is quite a little ways back and there is a lot of things transpired since then to

(Deposition of James V. Davis.)

remember. However, I presume I could look that up. [368]

Q. Do you know what year it was that Jack started in handling oil down there on his dock, to which you refer as the Union Oil dock?

A. No; I am not certain as to that. It was in 1915 or 1916; I believe 1915.

Q. The custom generally with steamship men, in buying their oil from these two oil companies, selling at the same price, they usually get their oil where it is most convenient for them to get it, don't they?

A. If the price is the same.

Q. Yes.

A. There are a lot of— I don't know anything about steamship men, but there are a lot of gas boat men that figure that one brand of oil is better than another one. They have queer ideas about one kind of coal oil and a certain kind of distillate and gasoline being better than another, and they're willing to pay another figure for it, but personally I have never seen any difference. It's all the same to me.

Q. But you can't specify the year now, nor the month, that it was that you went to McBride and he didn't have any oil and you went back and got oil from the Standard Oil again?

A. No, I couldn't be sure of that.

Judge WINN.—I think that's all.

Q. Oh, where were you running that boat, between what ports in 1915? A. 1915?

(Deposition of James V. Davis.)

Q. Yes.

A. I run from Juneau, to Funtler Bay, Gypsum, to Tenakee, Warm Springs Bay and return, once a week. [369]

Q. Did you do that all the year 1915 and all of 1916? A. Not in 1916.

Q. Not in 1916.

A. No. In April, or about the first part of April, 1916, there was a new ruling out in the steamboat inspector's office one day, making it compulsory to have a lifeboat for each passenger carried, or something like that, and it cut my passengers down to three; so I quit the passenger business and went to towing. That was in April, 1916.

Q. Were you running a gas boat all of 1915, 1916 and 1917? A. Yes, sir.

Q. What business did you have?

A. We had the "St. Nicholas" and we had— I was in partnership with Doc Kaser. He had the "Murrelet" at the same time.

Q. Did you ever go into Ketchikan and those places to get oil? A. Yes, sir.

Q. During 1915 and 1916?

A. I think during 1915, or thereabouts, I went into Ketchikan. I took the "Carlotta Cox" down to Prince Rupert—a broken-down Canadian halibut steam schooner,—and I don't remember whether I oiled up there on the way down or coming up, but I oiled up one way or the other.

Q. Well, did you get it from the Union Oil Com-

(Deposition of James V. Davis.)

pany at Ketchikan or from the Standard Oil Company? A. I couldn't tell you that.

Q. Who had the agency for the Union Oil Company down there in 1915?

A. In Ketchikan? I don't know.

Q. Do you know in 1916, Jim? [370] A. No.

Q. Did you get any oil in 1916?

A. I couldn't tell you who the agent was down there, now. I haven't stopped at Ketchikan much.

Q. Did you get any oil at any other place except Juneau during the years 1916 and 1917?

A. Besides Juneau? Yes, I got considerable oil at Petersburg during 1916—not considerable, I would say several times.

Q. Any other place besides Petersburg, Juneau or Ketchikan during the years 1915 and 1916?

A. I don't know.

Q. Do you know whether they were handling any at Sitka or not?

A. No; I didn't run to Sitka. I might have taken on a few hundred gallons to fill out at times.

Q. Principally at these other places?

A. Yes, principally at Juneau.

Q. You don't know whether you got any at Sitka at all or not?

A. No; I don't think I did; I didn't run to Sitka in those days.

Q. Oh, didn't you? A. No.

Q. Of course, you are dealing with the Standard Oil Company now? A. Sir?

(Deposition of James V. Davis.)

Q. I say you're dealing with the Standard Oil Company now? A. No, sir; Union Oil.

Q. Who handles it?

A. The Chichagoff Mining Company.

Q. They are the agents?

A. They are not the agents, but they are the only ones that [371] have a supply of the oil that I use.

Redirect Examination.

(By Mr. FAULKNER.)

Q. You use a different kind of oil now?

A. Yes; I use this Diesel engine oil; Diesel fuel oil.

(Witness excused.)

United States of America,

Territory of Alaska,—ss.

I, George W. Folta, a notary public in and for the Territory of Alaska, do hereby certify that heretofore, to wit, on the 19th day of January, A. D. 1922, personally appeared before me, at the United States District Court, at Juneau, Alaska, a James V. Davis, a witness produced on behalf of the defendant in a certain cause then pending and undetermined in the United States District Court for the First Judicial Division, at Juneau, Alaska, wherein the Union Oil Company of California is the plaintiff and the C. W. Young Company, defendant.

I further certify that the said witness, James V. Davis, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in

the cause aforesaid; that the testimony then given by him was by me reduced to writing by means of shorthand and afterwards transcribed, and that the foregoing is a true and correct transcript of the testimony so given by him as aforesaid.

I further certify that the taking of this deposition was in pursuance of stipulation of counsel for respective parties, directing me to take such deposition, and that there were present at the taking of this deposition, Messrs. John R. Winn and L. C. Kelley, on behalf of the plaintiff, and Mr. H. L. Faulkner, on behalf of the defendant.

I further certify that I am not counsel for nor in any way related to any of the parties to this suit, nor am I in any way interested in the outcome thereof.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this thirteenth day of March, A. D. 1923.

Notary Public for the Territory of Alaska, residing
at Juneau.

My commission expires Oct. 11, 1925. [372]

Mr. FAULKNER.—We next offer to read the deposition of Albert Nielson.

Judge WINN.—No objections.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG CO., a Corporation,

Defendant.

Deposition of Albert Nielson, for Defendant.

BE IT REMEMBERED That pursuant to the stipulation of counsel for the respective parties in the above-entitled action, attached hereto, on the 12th day of January, 1923, between the hours of five and six P. M., in the city of Juneau, Alaska, before me, George W. Folta, a notary public in and for the Territory of Alaska, residing at Juneau, personally appeared ALBERT NIELSON, a witness produced on behalf of the defendant in the above-entitled action, now pending in said Court, who, being by me first duly sworn to testify to the truth, the whole truth and nothing but the truth in said case, testified as follows: [373]

Direct Examination.

(By Mr. FAULKNER.)

Q. Captain, will you just state your name?

Judge WINN.—Now, just in order to preserve the record—although perhaps it is preserved by the stipulation—but at this time I object to any testimony or evidence being offered by the defendant in this case, for the reason that there is no defense set

(Deposition of Albert Nielson.)

up in its answer which it made, I think, to the third amended answer—however, it's the last one—filed in the case, to the matters and facts that are set up in the complaint; that, whether it is in the nature of denials, cross-complaint, counterclaim or offset, the facts and allegations contained in the entire answer constitute no defense to the complaint; nor do they constitute any counterclaim, offset or cause of action whatever against the plaintiff in this case; that if everything is taken as true which is set up in the third amended answer, the purported orders or agreements to furnish oil by the Union Oil Company to the various parties mentioned in the bill of particulars are not binding in any wise, or upon the plaintiff in this case. It is against the law, irrelevant and immaterial, absolutely.

The COURT.—You renew your objection now?

Judge WINN.—Yes, sir.

The COURT.—Objection overruled.

Judge WINN.—Allow us an exception.

Q. Now, Captain, would you just state your name, please? A. Albert Nielson.

Judge WINN.—However, I may state before that, that I make this objection in no wise impairing or detracting from my [374] right to raise these same objections under the stipulation that I signed with Mr. Faulkner, representing the defendant, to take the captain's testimony.

Q. Captain, in what business are you engaged?

A. Well, I am superintendent for the Northwestern Fisheries Company.

(Deposition of Albert Nielson.)

Q. How long have you been such?

A. Since 1912.

Q. Where have you been employed since 1912, Captain?

A. I was nine seasons in Dundas. Since 1912 we operated there. The last year we operated was in 1920.

Q. From 1912 to 1920 you were at Dundas Bay?

A. Yes.

Q. Your company has a cannery there, has it?

A. Yes.

Q. Now, Captain, in the year 1916, did you order any gasoline or lubricating oil from the C. W. Young Company?

Judge WINN.—The same objection to this question; and, furthermore, it's hearsay and not binding upon the plaintiff in this case.

Judge WINN.—That is the same objection I have been urging.

The COURT.—Objection overruled.

Q. Now, you can answer. In the year 1916, did you order any gasoline or lubricating oil from the C. W. Young Company?

A. Yes; I sent a boat in to get some oil. I believe I spoke to Mr. McBride before, a few days before, about getting some oil from him.

Q. Now, how much oil did you order or intend to get?

Judge WINN.—The same objection, as the time and the year [374½] are not designated.

Mr. FAULKNER.—Yes, I said in the year 1916.

(Deposition of Albert Nielson.)

Judge WINN.—He said he didn't get the oil himself. That is one reason.

The COURT.—Objection overruled.

Judge WINN.—And I still urge the other objection; that it is hearsay in addition thereto and not binding upon the plaintiff in this case.

Q. Now, how much oil, Captain?

A. Well, I can't remember offhand how much, but, as a rule, when we sent a boat in for oil, we sent the "Spencer" and we generally used to load her up, and she took about forty drums to make a load.

Q. How many gallons would that be?

A. That would be 110 gallons to the drum, something over four thousand gallons.

Q. Something over four thousand gallons?

A. Yes.

Q. Now, how many times do you remember sending her in to get oil that season?

Judge WINN.—I object to that as absolutely incompetent, irrelevant and immaterial. They are confined to the bill of particulars in this case and the bill of particulars only sets up that only one order was given for gasoline and lubricating oil for the year 1916.

The COURT.—Objection overruled.

Q. How many times do you remember sending her in?

A. Well, offhand, I couldn't say. I wouldn't say whether it was once or twice we sent the boat in, but we didn't get any oil. [375]

(Deposition of Albert Nielson.)

Q. Didn't get any oil. Do you know why—

Judge WINN.—I object to that. There is no foundation laid for the witness to answer the question. It's hearsay.

The COURT.—Objection overruled.

Q. You know why?

Judge WINN.—In addition to the other objections.

The COURT.—The same ruling.

A. Yes; because they didn't send any oil up.

Q. They didn't have it?

A. They didn't have it.

Q. Now, Captain, did you send the boat in on behalf of yourself or the Northwestern Fisheries Company?

A. No; Northwestern Fisheries, I guess.

Q. Northwestern Fisheries.

A. Of course, they wrote to us to get oil wherever we could.

Q. Now, you spoke to Mr. McBride a few days before about getting oil? A. Yes.

Q. Did you order any lubricating oil from the C. W. Young Company?

A. Very likely we did, because we would get that at the same time we did the gasoline.

Judge WINN.—I move to strike out the answer as not responsive to the question. Oh, let it go.

Q. Would you know, Captain, or could you tell now, what quantity of lubricating oil you ordered during 1916 and 1917?

A. From the C. W. Young Company?

(Deposition of Albert Nielson.)

Q. From the C. W. Young Company.

A. No, I can't say how many barrels that would be, but as a rule, when we get a quantity of oil, some thirty or forty drums, we [376] generally take a couple or three barrels of lubricating oil with it.

Mr. FAULKNER.—I think that's all.

Cross-examination.

(By Judge WINN.)

Judge WINN.—For the preservation of the record, I move to strike out all the evidence and testimony of the witness for the reasons set forth in my first objection. It is hearsay also, and taking the testimony as true, it furnishes no case of counterclaim, offset or cause of action as against the plaintiff, or any defense to the matters set forth in the complaint in this case, and reserving, of course, the right to urge the objections, as well as any objection that I may have under the stipulation, I will cross-examine the witness.

That objection is because it's hearsay. He never came for any oil. It is what somebody else told him. Besides I urge the objections heretofore made. I think it is hearsay and that it should be stricken.

The COURT.—Part of it is hearsay and part of it is not hearsay.

Mr. FAULKNER.—He said he sent in the boat.

The COURT.—Yes; and that is relevant. I'll overrule the objection.

(Deposition of Albert Nielson.)

Q. You were at Dundas Bay, operating a cannery there, in the season of 1916, were you, Captain? A. Yes.

Q. You acted in what capacity?

A. Superintendent. [377]

Q. Who was Mr. McCue? He was connected with the Northwestern Fisheries Company at that time?

A. Yes.

Q. In what capacity was he serving that company?

A. Well, I don't remember exactly when it was he was made general superintendent, but I remember Mr. McCue was general superintendent or assistant superintendent at that time, that year. I couldn't say that offhand. I have forgotten now.

Q. He was up here?

A. No; I don't know whether he was here at all that year or not. Some years he used to come up and other years he didn't.

Q. What are Mr. McCue's initials, do you remember, Captain? A. P. H.

Q. In what capacity is he serving the Northwestern Fisheries Company at the present time, and has been for the last year or so?

A. He has been general superintendent.

Q. For how long?

A. Well, he must have been general superintendent for four years, or so. I forget now how many years it is since McCue was appointed, but I think it must be about three years or four years.

Q. Where was Mr. McBride when you say that you had a conversation with him about the C. W.

(Deposition of Albert Nielson.)

Young Company furnishing any lubricating oil or gasoline for the year 1916?

A. Well, I don't know. I think it was in his office. I am not sure of that. Might have been in the store.

Q. You don't remember that? A. No.

Q. Anybody else present besides you and Mr. McBride? [378] A. I don't remember that.

Q. What were the words that you stated to Mr. McBride and what did he say?

A. I think Mr. McBride asked me if he couldn't supply us with oil on the same basis as we bought at other places, the same prices, and I told him yes, if he had the oil there, we could take it from him.

Q. That was all the conversation you had with Mr. McBride concerning it?

A. That was about all, I guess.

Q. You didn't come in, Captain, after the oil yourself, did you?

A. No; I sent a boat in for it.

Q. And all that you know about the reason for not getting this character of refined and lubricating oil is what somebody else reported to you after they came from Juneau, was it?

A. No; I think Mr. McBride wrote me a letter on the return of the boat.

Q. Have you got that letter?

A. No; I haven't got that letter now. Anyway, he sent word—I don't know whether it was with the captain or wrote up the letter—I am not sure of that—that he couldn't get the oil at that time, but that he expected to get the oil soon.

(Deposition of Albert Nielson.)

Q. Who was the captain of the boat that you sent in here at the time?

A. I think his name was Jimmy Cunnane at that time.

Q. Is he with the Northwestern Fisheries Company now? A. No; he is not.

Q. When did he quit the service of the Northwestern Fisheries Company? [379]

A. Well, he quit about four or five years ago; four years ago, I think it was.

Q. You don't know where he is now, do you?

A. Well, I think he is around the camp in the winter time. In the summer time he is on boats. Last year he was on the "Canco," the American Can Company's boat. I think he was captain on the boat at that time.

Q. You wouldn't state positively whether you received any written communication from Mr. McBride, or not, would you, concerning this matter?

A. Not at this time, but I think I did. I think I got a letter.

Q. But you had no other or further conversation with Mr. McBride about the matter?

A. No.

Q. Other than you have already stated?

A. No, I don't think so—just about the oil.

Q. Now, you say that if your steamer had obtained the oil that was necessary for the cannery to have then, it would have been about how many gallons?

(Deposition of Albert Nielson.)

A. Oh, at that time it would have been about 4,000 gallons. I have an idea that that is about a full cargo for the boat.

Q. You have it in the bill of particulars in this case as being about 3,300 gallons.

A. Well, perhaps it would have been that. I couldn't say, but I know the boat packs about 4,000 gallons.

Q. You know what the price of that gasoline was per gallon?

A. I knew at that time, but I don't remember now. It's so long ago.

Q. Can you tell approximately what the price of the refined oil or the gasoline was? [380]

A. No, I wouldn't. I couldn't tell you that right now without looking up the records.

Q. Well, would it be somewhere between fifteen and twenty cents a gallon, the refined oil, approximately, Captain?

A. You mean distillate?

Q. Yes, I mean— They call it refined oil here and lubricating oil.

A. We considered it less than that, because the oil was quite a bit cheaper then than it is now.

Q. You don't know what it was selling at, though? You don't remember what it was selling at?

A. No; not at this time. I couldn't recall that.

Q. You don't know what lubricating oil was selling at?

A. No; I wouldn't say at this time. I couldn't say.

(Deposition of Albert Nielson.)

Q. The remaining part of that season you got oil from the Standard Oil Company?

A. Yes, I believe we did. We borrowed oil a few times, but we returned it as soon as we got the oil. I think we got oil from the Standard Oil, yes.

Q. You know that Mr. McCue had a contract with the Standard Oil Company for furnishing the Northwestern Fisheries Company's canneries, including the cannery at Dundas Bay, with this kind of oil and lubricating oil for the season of the year 1916?

A. No; I don't remember that. I don't remember that.

Q. You couldn't say whether he did or did not?

A. No, I wouldn't.

Q. If Mr. McCue stated that he did have a contract, you would have no reason to deny it, would you, Captain? [381]

A. No; I wouldn't have any reason to deny it if he had a contract.

Q. But you didn't get any gasoline or lubricating oil through the C. W. Young Company, or Mr. McBride, for the season of 1916?

A. Well, I don't remember. We got some oil from the C. W. Young Company. I don't remember what year it was.

Q. Well, this is confined to 1916, Captain. You don't remember whether you got any oil at all from the C. W. Young Company in the year 1916, do you?

(Deposition of Albert Nielson.)

A. Well, very likely we got some oil from the C. W. Young Company. It seems to me that we had some of their drums at the cannery.

Q. Any personal remembrance of it?

A. No; I haven't at this time; not at this time; not with me.

Q. Did you get it yourself or did somebody else get it?

A. Well, I might have been with the boat myself. I remember one instance we landed some drums here. On our return from the cannery we landed some empty drums at C. W. Young's or the Union Oil Company. No doubt, I must have got the oil from Mr. McBride because we landed the empty drums at his dock.

Q. But you didn't obtain the oil yourself?

A. No; the oil was for the company, naturally.

Q. Well, I mean you weren't personally present when any oil was delivered to you or the Northwestern Fisheries Company by the Union Oil Company, for the year 1916, were you?

A. No; I might have been in town, but I was never up to the oil dock with the boat. The boat might have been up there and got the oil while I was in town here.

Q. To supply your cannery for that season with lubricating oil [382] and gasoline, did you send into Juneau for it, or did the tankers of the Standard Oil Company deliver the oil to you at the cannery?

A. No; I don't think they did deliver at the cannery there at that time.

Q. 1916? A. No; I don't think so.

(Deposition of Albert Nielson.)

Q. Well, that is the only year that this is confined to. And about the best remembrance you have of it is that if oil had been procured from Mr. McBride or the C. W. Young Company at the time that you say that the captain or somebody reported to you about it, it might have been in the neighborhood, you think, of about 4,000 gallons of refined oil, gasoline? A. Yes.

Q. And about how much lubricating oil?

A. I couldn't say. I don't remember.

Q. What is your best remembrance?

A. Well, when we sent for forty drums of distillate, we used to get three drums of lubricating oil. That is the equivalent that would last about the same period as the oil on the gas boats.

Q. Well, that would be approximately how many gallons of lubricating oil?

A. Oh, about a hundred and fifty or sixty.

Q. You don't remember the price of lubricating oil that season, do you?

A. No; I don't for that season.

Q. Now, you have told of all the transactions that you had with the C. W. Young Company or Mr. McBride, who was acting for that company, concerning the obtaining of distillate or [383] refined oil or lubricating oil during the year of 1916, have you? A. I think I have.

Q. You don't remember what you paid the Standard Oil Company for oil during that year?

A. No.

Q. And gasoline?

(Deposition of Albert Nielson.)

A. But I know—I remember that the price was the same. We couldn't buy it except for the same price as the Standard Oil. That's the reason I know that. But we were supposed to buy where we could buy the cheapest; so I have a good idea that it was the same price.

Judge WINN.—That's all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Captain, you had authority, did you, from the Northwestern Fisheries Company to purchase oil whenever it was needed?

Judge WINN.—I object to it as calling for a conclusion of the witness. Oh, go ahead; we withdraw it.

Q. I say, you had authority as manager of the company? A. Yes.

Judge WINN.—You weren't manager of the company? A. No.

Mr. FAULKNER.—Well, superintendent of the cannery?

A. Yes.

Recross-examination.

(By Judge WINN.)

Q. But Mr. McCue made the contracts generally, did he not?

A. I don't know whether Mr. McCue made the contracts or somebody else in the office made the contracts. I couldn't say. If there was a contract made that year likely it would be [384] Mr. McCue or Mr. Whitelaw.

Q. And you have been governed by whatever

(Deposition of Albert Nielson.)

contract they made concerning the procuring of gasoline or lubricating oil, would you not?

A. Yes; so far as the— If the Standard Oil had the oil. I don't remember now whether the Standard Oil Company had oil here at that time; it's so long ago that I forget; but we are supposed to buy oil wherever we can when we need the oil providing we need it very badly, whether it's on a contract or not.

Q. Well, you got plenty of oil that season, 1916?

A. Well, I don't think we got plenty, because we had to borrow oil at times.

Q. Well, but I say you got for yourself all you needed? A. Yes.

Q. Whether you borrowed it or bought it?

A. Yes.

Q. Of course, if you borrowed it you paid it back, or bought it or paid for it? A. Yes.

Judge WINN.—That's all. I reserve a motion to strike the entire evidence or offering of the deposition.

Mr. FAULKNER.—Defendant rests.

Whereupon the plaintiff, by its counsel, moved to strike all the evidence introduced under the affirmative defenses, the evidence pertaining to any purported sales that defendant could have made, and all the exhibits, except the letter of March 1, 1915, from Geo. D. Clagett to Mr. McBride; and plaintiff further moved it recover from defendant the full amount claimed to be due in the two causes of action, together with interest thereon, at eight per cent per annum from the date stated

(Testimony of Wilfred C. Trew.)

in the complaint, and also the plaintiff raised the question of preclusion by the statute of frauds.

Court adjourned until Jan. 24, 1923, at 10 o'clock A. M. [385]

Wednesday, January 24, 1923.

Court met pursuant to adjournment at 10 A. M.

Argument was resumed and continued until recess taken until 2 P. M.

Court met pursuant to recess at 2 P. M.

The COURT.—I have considered the motions submitted yesterday, and the several arguments and the authorities cited by both parties, and I am of the opinion that the motions should be denied, and it is so ordered.

Judge WINN.—Allow us an exception, your Honor.

Whereupon the plaintiff, to further maintain the issues on its part, introduced the following evidence, to wit:

REBUTTAL.

Testimony of Wilfred C. Trew, for Plaintiff (Recalled in Rebuttal).

WILFRED C. TREW, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. KELLEY.)

Q. Mr. Trew, were you present at the Rainier-Grand Hotel in Seattle at the time of the conversations that have been testified to by Mr. McBride,

(Testimony of Wilfred C. Trew.)

between himself and Mr. Clagett of the Union Oil Company? A. Yes.

Q. What points were discussed at that time, Mr. Trew?

A. We, first of all, took up the question of the old, unpaid account.

Q. That was an account arising before—

A. (Interposing.) Before the agency was in commission; before the agency started.

Q. What other points, Mr. Trew?

A. They discussed the terms, in general, that we had decided on. [386]

Q. Just in brief, what different points were discussed?

A. We discussed the question of commissions and Mr. McBride thought that some of the commissions should have been a little more, but Mr. Clagett told him at the time that he was giving him the best commissions he possibly could.

Q. Was there anything said in that conversation concerning the extension of credit to Mr. McBride?

A. Yes. Mr. Clagett asked me to explain to Mr. McBride our system of gathering the credit information on what we call our form 311.

Q. What was said, if anything, at that conversation concerning who was to carry the accounts—the Union Oil Company or C. W. McBride?

Mr. FAULKNER.—C. W. Young Co. I didn't get the purport of that.

Mr. KELLEY.—This conversation that Mr. McBride had—

Mr. FAULKNER.—In 1915?

(Testimony of Wilfred C. Trew.)

Q. When was that conversation?

A. I think that was in February, 1915.

Q. What was said, if anything, at that conversation, Mr. Trew, concerning whether the Union Oil Company would carry the accounts or the C. W. Young Company would carry the accounts on which credit was extended?

A. Mr. Clagett explained that practically all sales were to be made on a cash basis, but if the accounts were sold on a charge basis that the orders were to come to Seattle and be invoiced by the Seattle office of the Union Oil Company.

Q. What, if anything, was said in that conversation concerning payment?

A. You mean of customers' accounts or—?
[387]

Q. Remittances for goods sold by the C. W. Young Company.

A. Cash sales were to be remitted on the first available boat, accompanied by the orders for the cash sales.

Q. What about the other?

A. Other payments were to be made on the tenth of the following month, according to our regular terms.

Q. As I understand it, then, he would pay for the April sales on or before the tenth day of May?

A. The sales of any month were payable on or before the tenth of the following month.

Q. The tenth of the following month. Was there anything said in that conversation concerning the drum and barrel situation?

(Testimony of Wilfred C. Trew.)

A. Mr. Claggett said that he would allot as many drums to this Territory as he could possibly spare from the other territories and at that time he told Mr. McBride to be careful in sending drums and barrels to remote districts where they couldn't come back for a long time and also explained that we had had a great deal of difficulty in putting packages on launches in excess of what they could take in their tanks.

Q. What, if anything, was said in that conversation concerning the return of empty drums?

A. The drums were to be returned as promptly as possible by any boat coming, and, provided a certain freight rate could be secured, they were not to be shipped back in carload lots; that they were to be shipped back just as quickly as they could possibly be returned.

Q. Did Mr. Claggett at that time explain to Mr. McBride the [388] reasons for giving such instructions?

A. There had been a ruling of the Interstate Commerce Commission that we couldn't purchase any more 110-gallon drums. We expected to be able to purchase 55-gallon containers, but we could not purchase any 110-gallon drums. They wouldn't stand the specifications required.

Q. Mr. Trew, Mr. McBride testified, in substance, that in that conversation Mr. Claggett agreed to furnish him with all the products of the Union Oil Company which he could sell in southeastern Alaska. Was any such statement as that made by Mr. Claggett?

(Testimony of Wilfred C. Trew.)

A. No; there was not. It was Juneau and the vicinity, and right after that meeting Mr. Clagett asked me to make out a list of the accounts to whom we would extend credit, and I looked up the map at that time, not being familiar with the towns around here, and picked out three or four towns that were close to Juneau and made a list of the accounts in Juneau and these few smaller towns to whom we could extend credit and others that we would want on a strictly c. o. d. basis. I didn't get all the towns in, but it was in the neighborhood of these places.

Q. Do you know whether the Union Oil Company had an agency at Ketchikan at that time?

A. Yes; they did.

Q. Who was the Union Oil Company agent at Ketchikan?

A. The New England Fish Company.

Q. Were there other conversations in 1915 at which you were present? A. During 1915?

Q. Well, during— I withdraw that. Were there any conversations, [389] any further conversations between Mr. Clagett and Mr. McBride during the early part of 1915?

A. I don't know.

Q. Do you know whether Mr. McBride called at the Union Oil Company's office?

A. He did once after that. He may have called more, but I remember once distinctly.

Q. Were you present at any conversations had

(Testimony of Wilfred C. Trew.)

between Mr. McBride and Mr. Clagett during the latter part of 1915 or the early part of 1916?

A. Yes.

Q. Was the question of payment discussed at that time? A. The account was always slow.

Q. Well, was the question of payment discussed at that time?

Mr. FAULKNER.—Just a moment, if the Court please. I think that this is hardly rebuttal evidence under the pleadings. There is no allegation that there was anything wrong with the payments—simply that they owed them for this particular amount of oil on August 24, 1918.

The COURT.—Well, he is going into the question of what the contract was—how the parties construed it.

Mr. KELLEY.—Not only that, but they testified that they complied with all the terms and conditions of this contract. Now, we have a right to show that they didn't.

Mr. FAULKNER.—No, I don't think so. I don't think that that matter of the payments, whether there was a payment that should have been mailed on one boat and didn't get there on the next boat, was gone into at all. There was nothing on the direct examination and, of course, there was nothing on the part of the defense, and there is nothing in the [390] pleadings. That is an entirely different matter from what is raised in the pleadings.

(Testimony of Wilfred C. Trew.)

The COURT.—He may answer. Objection overruled.

Mr. FAULKNER.—Exception.

The COURT.—Was the payment discussed—the question of payment discussed?

A. I believe that—

Q. (Interrupting.) Just answer the question yes or no. A. Yes.

Q. You may state what was said at that time between yourself and Mr. McBride and Mr. Clagett or anyone else who was present?

A. I asked Mr. Clagett to speak to Mr. McBride and ask him if he could keep the payments up to date, within our regular terms.

Q. Was he keeping them up to date? A. No.

Q. How much in arrears would he be at times during the year 1915?

A. Sometimes three or four months.

Q. Did Mr. Clagett discuss that matter with Mr. McBride in your presence? A. Yes, sir.

Q. What was Mr. McBride's reply, if any?

A. Mr. McBride said he would try and hurry up the payments.

Q. Mr. Trew, was there any discussion had at that time concerning drums and barrels?

A. Yes; Mr. Clagett asked Mr. Humphrey at the time to make out a list of the outstanding drums and barrels and the question of getting them back on the first available boat was again [391] discussed at that time.

(Testimony of Wilfred C. Trew.)

Q. Did Mr. Claggett in his conversations at the Rainier-Grand Hotel and in the conversations in 1916, explain to Mr. McBride the results of his failure to return empty drums and barrels?

A. He did in 1916. I don't remember if he went into the details in 1916.

Q. What time— I withdraw that. What did he tell him in 1916?

A. He told him that we had allotments made to our different substations. We could not buy additional drums and it was imperative that we get the drums back promptly and not wait for large shipments.

Q. Was the question of invoicing customers discussed in the conversations of 1916, 1915—pardon me—1915 and the first part of 1916?

A. Yes, I was asked the number of accounts that had been charged direct to customers. I looked over the ledger at that time and I think I was only able to find two or three accounts. The rest were all charged direct to the C. W. Young Company and Mr. Claggett explained that we wanted to be identified with our customers in Alaska and wanted to do our own invoicing.

Q. Did he explain why?

A. Because we wished to be identified with the customers; also that we would get our payments promptly.

Q. In the conversation the latter part of 1915 or the first part of 1916, did Mr. Claggett, in that

(Testimony of Wilfred C. Trew.)

connection, make any reference to the conversation of 1915? A. I don't remember as to that. [392]

Q. During 1915, during 1916, did Mr. McBride keep the account of the C. W. Young Company paid up?

A. No; it was never up to date, possibly with one exception.

Q. How much in arrears would it frequently become?

Mr. FAULKNER.—If the Court please, we object to this as not rebuttal and not within the pleadings. There is nothing in the testimony as to when the account should be paid and we didn't go into that matter.

The COURT.—I hardly think it is in the pleadings of the case. While he said that he complied with his contract of 1915 fully, he didn't state that in the contract as plead, that he was to make payments in any particular manner, but simply that he fully complied with his contract. Now, there is a denial that he fully complied with his contract, is there?

Mr. KELLEY.—I think there is. But, may it please your Honor, Mr. McBride has gone on the stand and told what the contract was—

The COURT.—(Interposing.) Yes.

Mr. KELLEY.—(Continuing.) And we have a right to show and will show that he didn't comply with it.

The COURT.—Yes.

(Testimony of Wilfred C. Trew.)

Mr. KELLEY.—And that is the purpose of this testimony.

The COURT.—Yes.

Mr. KELLEY.—We're not bound by Mr. McBride's testimony.

The COURT.—No; he may answer.

Q. During 1916 did he keep his payments up to date? A. No.

Q. How much in arrears would he become?

A. Oh, I should say three or four months. [393]

Q. During 1917 did he keep his payments up to date?

A. As I remember it, the account was never up to date from the time, from 1915 until the time he settled, with possibly one or two exceptions.

Q. Well, during 1917 did he keep it up to date at all? A. No.

Q. When did he pay for December, 1917? I withdraw that question?

Q. Did the Union Oil Company make any demand upon him for payment during the years 1915, 1916 and 1917?

A. Yes; we made constant demands for payment.

Q. And were those demands complied with?

A. Sometimes.

Q. But the account was never up to date?

A. No, sir.

Q. Do you know whether the C. W. Young Company returned empty drums and barrels promptly?

A. No; they did not.

(Testimony of Wilfred C. Trew.)

Q. Do you know why any orders **which the Union Oil Company** failed to fill were not filled?

A. Lack of packages sometimes, and other times, on several occasions, I think, shipments were held up on account of payment.

Mr. FAULKNER.—On account of what?

A. Payment.

Q. Mr. Trew, are you acquainted with the method of contracting with the canneries in the year 1916, for their oil requirements? A. Yes.

Q. Do you pass on contracts of the Union Oil Company for the Seattle district? [394]

A. All contracts.

Q. Do you know whether it is possible for oil companies to contract with canneries for specific gallonage?

Mr. FAULKNER.—Just a minute. We object to that as calling for a conclusion of the witness.

The COURT.—He may answer.

Mr. FAULKNER.—Exception.

A. Our contracts are always drawn up with a minimum and maximum clause.

Q. And never for a specific amount?

A. No, sir.

Q. Why?

A. Because they can't estimate in advance what they are going to use.

Q. Do you know, Mr. Trew, what the practice of oil companies is in connection with contracting for one or two or three years?

(Testimony of Wilfred C. Trew.)

Mr. FAULKNER.—The same objection to that—calling for a conclusion.

The COURT.—He may answer.

A. We never did contract for more than one year. Our printed contract distinctly specifies one year.

Q. Was Mr. McBride furnished with a supply of those contracts?

A. I don't know whether he was furnished with a supply. I know he saw the printed contract.

Q. Do you know, Mr. Trew, what the practice of oil companies—I withdraw the question. Did the Union Oil Company make a practice of making large shipments of oil, either lubricating or refined, into Alaska, using Union Oil drums?

A. If we used Union Oil Company drums, the customer made a deposit of whatever we considered the value of the drum [395] was—it varied and increased during the war. It originally was eight or ten dollars during, before the war, and during the war it went up to sixteen and twenty-two. In most cases the cannerymen, however, had their own drums, painted with their own color and stenciled with their name on the end.

Q. And that is the only condition under which the Union Oil Company would ship their drums to customers in Alaska, in large quantities?

A. Yes.

Q. Do you know whether the Union Oil Company keeps stock reports?

(Testimony of Wilfred C. Trew.)

A. They keep stock reports at main stations and all substations.

Q. Do you know whether, during the years 1916 and 1917, they kept stock reports of the stock on hand at Juneau, Alaska? A. They did.

Q. Do you know how those stock reports are made up?

A. They were made, first of all, by totaling the shipments made, less the orders turned in by the substation agents or our own stations, and deducting that amount leaves a certain balance on hand, and whenever possible we made a physical inventory.

Q. Did the C. W. Young Company, from time to time, return stock reports to the Union Oil Company? A. They sent in orders.

Q. Did they return any stock reports that you know of?

A. They sent in some stock reports; yes—physical inventories.

Q. These stock reports showed the actual gallonage of refined oil and lubricating oil which were on hand during the several months? A. Yes.

Q. Or at the end of several months? [396]

A. At the end of several months.

Q. Have you examined these reports and can you tell what they are (handing papers to witness).

A. Yes; they're stock reports.

Q. Have you gone through them? A. Yes.

Q. Have you checked them up? A. Yes.

(Testimony of Wilfred C. Trew.)

Q. Did you check them up when you were here in August, 1918?

A. No; I checked them before I came.

Q. For what purpose?

A. I didn't know what the result of my physical inventory of the stock would be and I wanted to be prepared for any emergency.

Q. Was it also for the purpose of ascertaining whether or not the stock on hand at the C. W. Young Company checked correctly when you were here.

A. I wanted to make sure, as I said, and prepared for any emergency and know what our reports showed and what the actual inventory showed.

Q. So that the actual inventory of the stock did check substantially with the report?

A. Yes, so closely that we paid no attention to the difference.

Q. Have you gone through these reports and can you now testify concerning the amount of stock on hand, as shown by the Union Oil Company reports, here at Juneau during the years 1916 and 1917?

A. I have made a pencil memorandum of the amounts on hand at the end of each month.

Q. Kindly read the amount of gasoline, kerosene and distillate [397] on hand as shown by the Union Oil stock reports the latter part of December, 1915.

Mr. FAULKNER.—That is incompetent, irrelevant and immaterial—what was on hand in Decem-

(Testimony of Wilfred C. Trew.)

ber, 1915, has nothing to do with this case. Attempts to show whether or not there had been any shortages during that year wouldn't have any bearing on the question at all.

The COURT.—What is the purpose of it?

Mr. KELLEY.—To show that our records showed that they had stock on hand at all times. That is our stock reports.

Q. I will ask you this question: when did these stock reports begin—with what day?

A. December, 1915, I think.

Q. Do you know whether we have any stock reports prior to that time now?

A. No; we have not.

Q. And these cover what years, then?

A. December, 1915; all of 1916 and all of 1917.

The COURT.—Objection overruled, showing a part of the period in question; part of the period covered by the first conversation.

Mr. KELLEY.—In other words, this isn't for the purpose of showing it prior to December, 1915.

The WITNESS.—You want me to read the gallons on hand?

Q. Yes; read the year and the month and the gallons of distillate, kerosene and distillate on hand the several amounts.

A. I might explain that in some of these cases this might not be exactly at the end of the month. I believe Juneau was asked to close several days before the end of the month, [398] so we could get it.

(Testimony of Wilfred C. Trew.)

Q. But approximately near the end of the month.

A: Yes, within a few days. (Reads:) December, 1916—1915, I mean, gasoline 8730, kerosene 3710, distillate 19645; January—these are all 1916 from here on—gasoline 12,713, kerosene 5842, distillate 31,696; February, gasoline 12,399, kerosene 4631, distillate 29,222; March, gasoline 9132 gallons, kerosene 3062 gallons, distillate 20,232; April, gasoline 8712, kerosene 2484, distillate 25,110; May, gasoline 4740, kerosene 2280, distillate 14,150; June, gasoline 5687, kerosene 3401, distillate 18,645; July, gasoline 3723, kerosene 3442, distillate 5878; August, gasoline 3559, kerosene 2772, distillate 4374—

The COURT.—That's August, 1916?

The WITNESS.—Yes, sir. September, gasoline 1273, kerosene 2588, distillate 2567; August, gasoline 732, gallons; kerosene 2620, distillate 21,056; November, gasoline 291 gallons, kerosene 4750, distillate 14,330; December, gasoline 6135, kerosene 5230, distillate 17,400 gallons; January, 1917, gasoline 5930, kerosene 4430, distillate 15,915; February, gasoline 5930, kerosene 4430, distillate 15,915; March, gasoline 8567, kerosene 3630, distillate 55,932; April, gasoline 6864, kerosene 2952, distillate 45,502; May, gasoline 5409, kerosene 2725, distillate 32,671; June, gasoline 5497, kerosene 4420, distillate 22,987; July, gasoline 4961, kerosene 4209, distillate 17,345; August, gasoline 4275, kerosene 3949, distillate 12,044; September, gasoline 6333, kerosene 4299, distillate 13,700; October, gasoline 3745, kerosene 3546, distillate 8440; November,

(Testimony of Wilfred C. Trew.)

gasoline 8284, [399] kerosene 3464, distillate 5083 gallons; December, gasoline 8136, kerosene 2767, distillate 19,075. Do you want me to continue in 1918?

Q. No.

Mr. KELLEY.—That's all.

Cross-examination.

(By Mr. FAULKNER.)

Q. You don't know who made up these reports?

A. Beg pardon?

Q. I say, you don't know who made up these reports that you have been reading from?

A. The stock reports?

Q. Yes. A. Yes, sir.

Q. Who made them up? A. Mr. Handley.

Q. I mean, who made them up in Juneau, the ones that you have been reading?

A. The orders or the stock reports?

Q. No, the stock reports.

The COURT.—The original stock reports of the memorandum?

Mr. FAULKNER.—Well, the original.

A. You're referring to these?

Q. Yes.

A. They were made up by the stock clerk.

Q. By the stock clerk? A. Yes, sir.

Q. And not by anyone here?

A. They were made up from the orders received from Juneau. [400]

Q. From the orders received from Juneau?

(Testimony of Wilfred C. Trew.)

A. Yes.

Q. How did you make them up from the orders received? Is this what you have been giving us—the amount of gasoline and oil on hand at the end of each month? A. Yes.

Q. How did you make those up?

A. From the difference between the oil shipped—we deducted from the oil shipped the orders sent from Juneau and the balance on hand would be the balance at the end of any one month.

Mr. KELLEY.—I don't think that counsel understands the witness yet. Mr. Faulkner refers to the orders which the C. W. Young Company sent to the Union Oil Company and Mr. Trew is referring to sales made by the C. W. Young Company to customers.

Mr. FAULKNER.—I understand him all right.

Q. Mr. Trew, that is the way you arrived at this?

A. Yes, sir.

Q. You deducted the sales. A. Yes, sir.

Q. And you say that the C. W. Young Company didn't make their remittances very promptly?

A. Yes.

Q. And sometimes had drums outstanding?

A. Yes, sir.

Q. And that he sold to a lot of various places in the district, canneries and various—

A. (Interposing.) Yes, sir.

Q. You gave them a list of customers at one time? [401] A. Yes, sir.

(Testimony of Wilfred C. Trew.)

Q. And those extended to places outside of Juneau, didn't they? A. Yes, sir.

Q. Now, did you have anything to do with the making up of the written contract dated February 14, 1917? A. Yes; I did.

Q. You are familiar with that? A. Yes, sir.

Q. And at that time you knew about these slow remittances, did you? A. Yes, sir.

Q. Yet you didn't put anything into the contract of February, 1917, about when the remittances were to be made, did you? A. When?

Q. Yes.

A. I am not sure without looking at the contract.

Q. The only thing you put in that was about the payment of the commissions, isn't that true?

A. I couldn't tell you. Evidently that was in the contract.

Judge WINN.—The contract speaks for itself. It was to be paid before the tenth.

A. I never knew of a contract without that clause in it. I don't know whether it is in that one or not, without looking at it.

Q. Well, I think not. Now, Mr. Trew, you stated that the reason you didn't ship the oils up here was because you didn't get remittances promptly? A. On two occasions, I think.

Q. On two occasions. You know nothing about the other occasions, do you?

A. That they didn't ship them? [402]

Q. Yes.

A. I think it was a lack of barrels.

(Testimony of Wilfred C. Trew.)

Judge WINN.—What was that?

The WITNESS.—A lack of barrels.

Q. These various letters and telegrams that the Union Oil Company sent to the C. W. Young Company during this period, in them the Union Oil Company didn't see fit to mention the fact that they couldn't make shipment on account of some remittances not having been received.

A. I went to Mr. Clagett on two occasions and told him—

Q. (Interrupting.) That isn't an answer to the question. The Union Oil Company didn't notify the C. W. Young Company that that was the reason that they couldn't make shipments, did they?

A. I don't know what letters you have.

Q. Well, those letters, of course, speak for themselves. They are all in evidence. I'll read them to the jury later on. Now, you weren't present at all the conversations between Mr. McBride and Mr. Clagett in 1915?

A. I have testified to two, I believe—

Q. You heard two, but you didn't hear any of the others. Now, in shipping barrels, returning empty barrels, Mr. Trew, you would have to have a certain quantity in order to make a shipment—have a certain number of them on hand—or would you want a barrel shipped back just as soon as it was empty?

A. I stated in my testimony that, provided they could get a certain rate, they were not to wait for a carload quantity of drums.

(Testimony of Wilfred C. Trew.)

Q. That depended on the rate they could get?

A. Yes. [403]

Q. Now, you used the Borderline Transportation Company for making shipments?

A. I believe we did use the "Wakena," "Northland" and some of the others.

Q. And returned your empty drums on those boats? A. At times; yes.

Q. Now, sometimes the boats didn't run very frequently? A. No; they didn't.

Q. And you had a special freight rate with them?

A. I don't know about that.

Q. That changed, from time to time—the freight rate? A. You mean on returned empties?

Q. Well, both.

A. Both ways. Oh, yes; the freight rate changed.

Q. When you shipped a large quantity of drums, you would get a better rate than if you would ship a couple of drums?

A. I'm not sure about that. I don't know whether they had arrangements for the same rate on less than carload lots or not.

Q. Now, Mr. Trew, you stated in answer to a question of Mr. Kelley that a cannery couldn't estimate the quantity of oil they would use; couldn't estimate in advance just how much distillate or gasoline they would use in a season. Is that true?

A. Yes; I did make that statement.

Q. Now, you think that the Hoonah Packing Company would, or would not know that in the

(Testimony of Wilfred C. Trew.)

year 1916, they would use at least 50,000 gallons of distillate?

A. I made the statement that they couldn't estimate accurately how much they could use. [404]

Q. You don't know whether that is the highest—

A. (Interrupting.) They might make the statement that they could use 30,000 or they might make the statement that they could use 100,000, but they might use more.

Q. And you don't know, as a matter of fact, what would be an average estimate for the Hoonah Packing Company?

A. I don't know, for a year; no.

Q. You don't know anything about that cannery nor what its operations were each of those years?

A. Yes; I do.

Q. You know how many fish they packed that year? A. No, sir.

Q. Or do you know how many cans? A. No.

Q. How many traps they had? A. No.

Q. How many boats they had? A. No.

Mr. FAULKNER.—I think that's all.

Redirect Examination.

(By Mr. KELLEY.)

Q. Mr. Trew, yesterday Mr. McBride testified that no delivery of Union Oil products was made to the Scandinavian Grocery Company subsequent to this written contract or order dated January 14, 1916, being Defendant's Exhibit "P." Do you know whether the Union Oil Company was carrying a

(Testimony of Wilfred C. Trew.)

charge account with the Scandinavian Grocery during that time? A. Yes.

Mr. FAULKNER.—Just a minute. I object to that question for the reason that it is not redirect examination and [405] incompetent, irrelevant and immaterial. It wouldn't make any difference if they were carrying a dozen. The question is whether Mr. McBride was to get a commission on it. The testimony is that on all stock sold at Juneau from the Juneau stock, he was to get a commission, whether he got it through the Union Oil Company, whether they carried the account or who carried the account; and the written contract provides that all commissions due from the Union Oil Company shall be paid the C. W. Young Company within ten days.

The COURT.—Objection overruled.

A. Yes, we were selling them at the time. I think this contract was taken to give them a certain price.

Q. Do you know whether that company went into bankruptcy? A. Yes; they did.

Mr. FAULKNER.—Just a minute. I object to that and move to strike the answer of the witness.

The COURT.—Yes, it may be stricken.

Judge WINN.—Well—

The COURT.—(Interrupting.) The answer will be stricken. The objection is sustained.

Mr. KELLEY.—That will be all.

Testimony of J. C. McBride, for Plaintiff (In Rebuttal).

J. C. McBRIDE, called as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. KELLEY.)

Q. Mr. McBride, the other day you identified Defendant's Exhibit "S," being the letter of April 7, 1917, pertaining to the Icy Straits Packing Company. A. Yes, sir. [406]

Q. Did you receive— Well, I'll put it this way; I hand you Plaintiff's Exhibit No. 1, dated May 2, 1917, and ask you what it is.

A. The date, Mr. Kelley?

Q. What is that? A. You ask me the date?

Q. No; I asked you what it is.

A. It's a letter from Mr. Kelly, the District Sales Manager of the Union Oil Company at Seattle, to the C. W. Young Company at Juneau.

Mr. KELLEY.—We offer it in evidence.

The COURT.—You say this was Plaintiff's Exhibit No. 1?

Mr. KELLEY.—For identification.

The COURT.—For identification No. 1. Just change that to "For identification No. 1."

Mr. FAULKNER.—No objection.

The COURT.—Mark it as an exhibit.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 3.)

The COURT.—Read it to the jury.

(Testimony of J. C. McBride.)

Mr. KELLEY.—(Reads:)

Plaintiff's Exhibit No. 3.

“Seattle, Wash., May 2, 1917.

“C. W. Young Company,

“Juneau, Alaska.

“Subject: Icy Straits Packing Company.

“In reply to your favor of April 21st, we will authorize you to make the Icy Straits Packing Company 1¢ gallon off the regular market-price, f. o. b. Juneau, on gasoline, kerosene and distillate, bulk and cases, if you can secure their lubricating business also. We cannot be obligated to them by contract nor make them a fixed price of any kind, but will give them this discount off the regular market [407] price at Juneau as long as we have the stock available with which to make deliveries. We will endeavor to pay you on a basis where you can meet legitimate competition, but it will be necessary to pass on each case as it develops and authority must be issued from this office for anything other than the regular open market-price.

“Yours very truly,

“V. H. KELLY,

“District Sales Manager.”

Q. Mr. McBride, you identified Defendant's Exhibit “J,” being a letter from the Union Oil Company to the C. W. Young Company, dated June 15, 1915, did you not? A. Yes, sir.

Q. I hand you these papers and ask you if that is the order referred to in this letter, showing what was shipped?

(Testimony of J. C. McBride.)

A. I think that was the order. I have a memorandum on this here.

Q. And this shows what was shipped at that time?

A. Yes, sir.

Mr. KELLEY.—We offer it in evidence.

The COURT.—That is in response to the letter from Mr. McBride?

Mr. KELLEY.—He identified the letter of confirmation and that shows what was actually shipped. Any objection?

Mr. FAULKNER.—No.

The COURT.—It may be received.

(Whereupon said order was received in evidence and marked Plaintiff's Exhibit No. 4.)

Mr. KELLEY.—It shows that the following was shipped by the Union Oil Company: 70 drums of distillate, 30 drums gasoline, [408] 300 cases, 2/5 gasoline; 10 cases 10/1 medium Motoreze, 10 cases heavy Motoreze, 10 cases extra heavy Motoreze, 10 cases medium Motoreze, 10 cases heavy Motoreze, 10 cases extra heavy Motoreze, 3 barrels Motoreze medium, 3 barrels Motoreze, heavy; 3 barrels of Motoreze, extra heavy, 1 barrel Union auto oil, 1 barrel Union Oil—no, Union auto oil X, 1 barrel Union auto oil double X, 1 barrel Union auto oil triple X, 2 barrels O. K. car oil, 2 barrels Aetna marine engine oil, 4 cases Aetna marine engine oil, 4 cases Aetna marine engine, 2 barrels Coronado compressor oil, 2 barrels Union compressor oil, 2 barrels Champion compressor oil, 2 cases Coronado compressor oil, 2 cases Union compressor oil, 2

(Testimony of J. C. McBride.)

cases Champion compressor oil, 4 cases Union cup grease No. 3, 6 cases Union cup grease No. 3, 2 cases Union cup grease No. 3, 4 cases Union cup grease No. 3, 2 cases Union cup grease No. 3.

Q. Mr. McBride, you identified Defendant's Exhibit "L," didn't you, being a telegram dated July 6, 1915? A. Yes, sir.

Q. I hand you a letter and ask you what that is?

A. This is a letter from the Union Oil Company at Seattle, to the C. W. Young Company at Juneau.

Q. Does it refer to this telegram?

A. (Examining telegram.) Yes, sir.

Mr. KELLEY.—We offer it in evidence.

Mr. FAULKNER.—Let me see them, together. The purpose of introducing the telegram was to show that the orders were sent in.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 5.) [409]

Mr. FAULKNER.—I haven't any particular objection, but I object to any further testimony or any further exhibits along this line, for the reason that the telegram which the letter answers is simply a telegram that was identified by the witness as being a telegraphic order sent for oil—no reference to whether it was filled or not. I just do that to shorten up the record. It doesn't make any difference.

Mr. KELLEY.—The telegram is dated July 6 and the letter is dated July 9, 1915.

Judge WINN.—They're a part of the records of the C. W. Young Company's office.

(Testimony of J. C. McBride.)

The COURT.—Your contract provides, as alleged in the contract, or the complaint, that they would ship all the oils that he could sell, and that shows at least a partial compliance with the order; so—

Mr. KELLEY.—They introduced the telegram to show that an order had been placed; now the letter goes in to show that it was filled.

The COURT.—You may read the letter.

Mr. KELLEY.—(Reads:)

Plaintiff's Exhibit No. 5.

“Seattle, Wash., July 9, 1915.

“C. W. Young Co.,

“Juneau, Alaska.

“Gentlemen:

“We shipped you on the steamer ‘Northland,’ July 8th, 40 drums of gasoline, 100 drums of distillate, 100 cases of gasoline and 10 barrels of Summer Black oil. Through an error, we mailed you all the gauges on the gasoline.

“Will you kindly return at least 2 copies to this office so that we may make proper record?

“Yours very truly,

“UNION OIL COMPANY OF CALIFORNIA.

“By C. M. COVELL,

“Special Agent.” [410]

Q. I hand you a letter dated May 2, 1917, Mr. McBride, and ask you what that is.

A. That is a letter to the C. W. Young Company,

(Testimony of J. C. McBride.)

addressed to Juneau, from the Union Oil Company.

Q. And you received it? A. Yes, sir.

Mr. KELLEY.—We offer it in evidence.

Mr. FAULKNER.—No objection; simply taking up time; incompetent, irrelevant and immaterial.

Judge WINN.—Taking up time? It's part of the correspondence from the C. W. Young Company's office.

The COURT.—I have no idea what it's about.

Judge WINN.—These are the records from the C. W. Young Co.

The COURT.—You might introduce a whole lot of records.

Judge WINN.—But they're part of the same transaction. They're part of the correspondence and we would like to introduce them so that the jury can have all the evidence before them.

The COURT.—This is May 2, 1917?

Mr. KELLEY.—Yes.

The COURT.—Objection overruled.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 6.)

Mr. KELLEY.—The letter is as follows:

Plaintiff's Exhibit No. 6.

“Seattle, Wash., May 2, 1917.

“C. W. Young Co.,

“Juneau, Alaska.

“Gentlemen:

“The steamer ‘Portland’ of the Independent Steamship Company left here yesterday with a shipment of oil for your storage.

(Testimony of J. C. McBride.)

“Will you please arrange to see that the ‘Portland’ brings back all the empty drums which you have on hand for return to us. We are quite anxious for this boat to bring back every empty that you have and trust you will so arrange. [411]

“We also understand that the ‘Portland’ will make regular trips to Juneau and Ketchikan, and should they call at any time, please arrange to deliver them what empties you have for transportation to Seattle.

“Yours very truly,

“UNION OIL COMPANY OF CALIFORNIA.

“By GEO. D. CLAGETT,

“District Manager.”

Q. I hand you a letter, Mr. McBride, dated April 17, 1916, and ask you what that is?

A. This was received by us from the Union Oil Company.

Mr. KELLEY.—We offer it in evidence.

Mr. FAULKNER.—I have no objection to this only that it takes up time. If the Court thinks it is material—

The COURT.—I don’t see that it is material.

(Letter read by Mr. Kelley, as follows:)

Plaintiff’s Exhibit No. 7.

“Seattle, Wash., April 17, 1916.

“C. W. Young Company.

“Subject: Return Empty Drums.

“Will you kindly ship us at once all empty iron

(Testimony of J. C. McBride.)

drums on hand by the Pacific Coast or Alaska S. S. Co., and oblige.

“Yours very truly,

“V. H. KELLY,

“District Sales Manager.”

(Whereupon foregoing letter was received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. I hand you a letter dated July 27, 1915; no, July 28, 1915, and ask you what that is, Mr. McBride.

A. That's a letter from the Union Oil Company to the C. W. Young Company.

Mr. KELLEY.—We offer it in evidence. It is right along the same line. [412]

Mr. FAULKNER.—This is absolutely just simply encumbering the record; not rebuttal at all. I don't want to be put in the position of trying to keep anything out of the record. They can put the whole thing in, if they want to do it.

The COURT.—What's the purpose of this?

Mr. KELLEY.—Showing he didn't return empty drums.

Mr. FAULKNER.—It doesn't show that he didn't.

Mr. KELLEY.—Yes, urging him all the time to return empty drums.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 8, and read by Mr. Kelley, as follows:)

(Testimony of J. C. McBride.)

Plaintiff's Exhibit No. 8.

"Seattle, Wash., July 28, 1915.

"C. W. Young Company,

"Juneau, Alaska.

"Gentlemen:

"We have your order No. 2599 of July 21st, covering shipment of oils on the 'S. S. Northland.' We have entered the same, which we will endeavor to ship complete.

"In regard to the price on transmission grease, we beg to advise that this price is the same as on the Union cup grease.

"Are you sending all your empty drums to us as fast as they are empty? We wrote you some time ago, requesting that you send these drums back to us on any boat that would take them, providing, of course, you could get the \$2 rate. We wish that you would do this rather than to wait for the 'S. S. Northland.' Please advise if you are doing this, and oblige.

"Yours very truly,

"UNION OIL COMPANY OF CALIFORNIA.

"By C. M. COVELL,

"Special Agent." [413]

Q. Mr. McBride, I hand you a telegram dated May 1, 1916, and ask you to read that.

A. Yes, sir.

Mr. KELLEY.—We offer it in evidence.

Mr. FAULKNER.—No objection.

(Whereupon said telegram was received in evidence and marked Plaintiff's Exhibit No. 9.)

(Testimony of J. C. McBride.)

Mr. KELLEY.—The telegram is from Seattle, Wash., dated May 1, 1916. (Reads:)

Plaintiff's Exhibit No. 9.

“C. W. Young Co.,

“Juneau.

“Please reply our letter April twenty-seventh. Home office insists on payment.

“UNION OIL CO. OF CALIFORNIA.”

Q. I hand you a copy of a letter dated October 25, 1916, and ask you if that is the letter that was written by the, copy of a letter written by the C. W. Young Company to the Union Oil Company at Seattle. A. Yes, sir.

Mr. KELLEY.—We offer it in evidence.

Mr. FAULKNER.—No objection.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. KELLEY.—The letter is as follows:

Plaintiff's Exhibit No. 10.

“October 25, 1916.

“Union Oil Company of California,

“Seattle, Wash.

“Gentlemen:

“Enclosed find our check for \$6473.23, being payment in full for all oils sold up to the first of October.

“We enclose also reports of sales for the refined and lubricating oils, covering the months of May, June, July, August and September, 1916, together

(Testimony of N. P. Madsen.)

with statements for each of the above months, showing the serial numbers of all sales slips with the amount of each sale. [414]

“The net sales for each month are as follows:

May	\$1629.10
June	2048.98
July	1676.92
August	1097.39
Sept.	712.28

Total	7185.51
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“Less our commission	712.28
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“Balance	6473.23
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“Trusting that you will find this correct, we are,

“Very truly yours,

“C. W. YOUNG CO.”

Mr. KELLEY.—That’s all.

Mr. FAULKNER.—I think that’s all.

(Witness excused.)

Testimony of N. P. Madsen, for Plaintiff (In Rebuttal).

N. P. MADSEN, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Judge WINN.)

Q. What is your name? A. N. P. Madsen.

Q. You know Mr. Jack McBride? A. I do.

(Testimony of N. P. Madsen.)

Q. Sometimes they call you Pete Madsen?

A. Yes, sir.

Q. How long have you lived in Juneau?

A. How long have I lived in Juneau?

Q. Yes.

A. Be ten years in April; next April.

Q. I will ask you, Mr. Madsen, if at any time during the year 1915, that you had any agreement with Mr. McBride, while he was agent for the Union Oil Company, to furnish you with [415] for the years 1915, 1916 and 1917, 2500 gallons of oil for each of those years and 125 gallons of lubricating oil for each of those years?

A. I had no contract with anybody.

Q. Did you have any conversation with him, telling him that you would agree to take that much from him?

A. No, I don't remember if I did, Judge. I had a contract with the United States Government to carry the mail, and that was while I was looking after it. I got my oil where I could and where it suited me best.

Q. You had no agreement with anybody about furnishing you with gasoline? A. No.

Q. Or lubricating oil? A. No; no agreement.

Q. Huh? A. Well, no agreement; no.

Judge WINN.—That's all.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Madsen, did you ever go to the Union Oil dock for oil when you couldn't get it?

Judge WINN.—Object to it as not proper cross-examination. I simply asked him if he had any agreement for oil.

The COURT.—The question is objectionable under the contract alleged because it doesn't call for the year; and I don't think it is proper cross-examination either. The objection will be sustained.

Judge WINN.—If your Honor please, we have a few depositions to read. I don't think we have any more witnesses. [416]

In the District Court for the Territory of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,

Defendant.

Depositions.

BE IT REMEMBERED That, pursuant to the stipulation and commission hereto annexed, and on January 9th, 1923, January 10th, 1923, and January 11th, 1923, and at the times and places hereinafter set forth, before me R. G. Sharpe, a notary public in and for the State of Washington, residing at Seattle, duly commissioned and sworn, personally appeared C. J. Alexander, O. W.

Carlson, Robert B. Bell, P. H. McCue, Frederick Howard Bailey and Archie W. Shiels, witnesses produced on behalf of the plaintiff in the above-entitled action, now pending in the said Court, who being first each duly sworn by me to tell the truth, the whole truth, and nothing but the truth, were then and there examined and interrogated by said R. G. Sharpe, said notary public; that the testimony of said Frederick Howard Bailey and Archie W. Shiels was taken on January 9th, 1923, between the hours of 9 o'clock A. M. and 10 o'clock A. M., at the offices of the Pacific-American Fisheries, in South Bellingham, Whatcom County, Washington, that the testimony of O. W. Carlson and P. H. McCue was taken on January 9, 1923, between the hours of 3 o'clock P. M. and 5 o'clock P. M., at room 710 L. C. Smith Building, Seattle, Washington; that the testimony of said Robert B. Bell was taken on January 10th, 1923, between the hours of 10 o'clock A. M. and 11 o'clock A. M., at room 710 L. C. Smith Building, Seattle, Washington; that the deposition of C. J. Alexander was taken on January 11, 1923, between the hours of 11 o'clock A. M. and 12 M., at room 710, L. C. Smith Building, Seattle, Washington; that the written interrogatories numbered from one to fourteen inclusive set forth on pages 6 and 7 hereof were propounded to the said witness, P. H. McCue, which witness did thereupon answer said written interrogatories as set forth on pages twenty-one and twenty-two hereof; that the written interrogatories numbered from one to fourteen, inclusive, set forth

on pages eight and nine hereof were propounded to the said witness, Archie W. Shiels, which witness did thereupon answer said interrogatories as set forth in pages twenty-four and twenty-five hereof; that the written interrogatories numbered from one to ten, inclusive, set forth on pages ten were propounded to said witness, Frederick Howard Bailey, which witness did thereupon answer said interrogatories as set forth on page twenty-three hereof; that the written interrogatories numbered from one to ten inclusive set forth on page eleven were propounded to said witness, O. W. Carlson, which witness did thereupon answer said interrogatories as set forth on pages seventeen and eighteen hereof; that the written interrogatories numbered from one to thirteen, inclusive, set forth on pages twelve and thirteen hereof were propounded to said witness, C. J. Alexander, which witness did thereupon answer said interrogatories as set forth on pages fifteen and sixteen hereof; that [417] the written interrogatories numbered from one to ten, inclusive, set forth on page fourteen hereof, were propounded to said witness, Robert B. Bell, which witness did thereupon answer said interrogatories as set forth on pages nineteen and twenty hereof.

[Seal]

R. G. SHARPE,

Notary Public in and for the State of Washington.

Residing at Seattle.

Deposition of Robert B. Bell, for Plaintiff.

Direct Interrogatories Propounded to ROBERT B.
BELL and Answers Thereto.

Interrogatory No. 1:

What is your name and where do you reside?

Answer to interrogatory No. 1:

My name is Robert B. Bell, and I reside at 720
Bellevue Avenue, North, Seattle, Washington.

Interrogatory No. 2:

What was your business during the years 1915,
1916 and 1917 or either or all of said years?

Answer to interrogatory No. 2:

During the year 1915 I was superintendent of the
Astoria & Puget Sound Canning Company at Ex-
cursion Inlet, Alaska. In 1916 and 1917 I was in
the State of Washington. In 1916 I was not em-
ployed, but in 1917 I was manager of the Sinclair
Island Canning Company, doing business on Puget
Sound.

Interrogatory No. 3:

Were you in any wise connected with any com-
pany engaged in the salmon packing business in
Alaska during either or all of the last mentioned
years?

Answer to interrogatory No. 3:

During 1915 I was superintendent of the Astoria
& Puget Sound Canning Company doing business at
Excursion Inlet, Alaska, which was engaged in
the salmon canning business there. I was [418]
not engaged in the salmon packing business in
Alaska during either 1916 or 1917.

(Deposition of Robert B. Bell.)

Interrogatory No. 4:

If you answer the last question in the affirmative, state what company or canneries you represented during either or all of said years and what capacity you served such cannery or company or companies.

Answer to interrogatory No. 4:

See answers to interrogatories 2 and 3.

Interrogatory No. 5:

Did you represent or were you connected in any way with the Astoria & Puget Sound Canning Company?

Answer to interrogatory No. 5:

See answers to interrogatories 2 and 3.

Interrogatory No. 6:

Did you know J. C. McBride and the C. W. Young Company during the years of 1915, 1916 or 1917 or any part of said years.

Answer to interrogatory No. 6:

Yes, during the year 1915 I knew them both.

Interrogatory No. 7:

Did you yourself (not what others did) during any of the times last above mentioned, either orally or in writing, order for yourself or the company or companies which you represented, any refined or lubricating oils from C. W. Young Company or J. C. McBride, of Juneau, Alaska?

Answer to interrogatory No. 7:

During the year 1915 as the superintendent of the Astoria & Puget Sound Canning Company I frequently purchased both lubricating and refined oils

(Deposition of Robert B. Bell.)

of C. W. Young Company at Juneau, Alaska, which oil was at all times delivered as soon as [419] ordered except on, I believe, one occasion when I, as such superintendent, sent a boat to Juneau, and they were unable to furnish oil I desired to purchase. None of the above orders for oil so purchased was in writing. I neither ordered or purchased any of such oils of any kind from C. W. Young Company during the years 1916 or 1917.

Interrogatory No. 8:

If you answer the last question in the affirmative state whether any such order was oral or in writing?

Answer to interrogatory No. 8:

All such orders were oral.

Interrogatory No. 9:

If it was orally, state the time and place and the people who were present and the wording of the order and the quantity of refined or lubricating oils ordered?

Answer to interrogatory No. 9:

As stated in answer to interrogatory 7, all orders given to C. W. Young Company were filled as soon as given with the one exception, of the order which was not filled, which order unfilled as above would not exceed a thousand gallons of distillate. I have no recollection as to times, places, persons present, wording of orders, and quantities ordered, as to each of the orders given. All such orders were immediately filled with the one exception named.

(Deposition of Robert B. Bell.)

Interrogatory No. 10:

If any such orders were so made as indicated in the last above questions and you state they were in writing, please attach same to this, your deposition and make it a part thereof.

Answer to interrogatory No. 10:

None of such orders were in writing. [420]

Judge WINN.—We now offer this deposition of Mr. Bell's in evidence, if your Honor please. Probably it is already in evidence, but it is customary to offer it in evidence.

The COURT.—It may be received in evidence.

Deposition of C. J. Alexander, for Plaintiff.

Direct Interrogatories Propounded and Answers
Thereeto.

Interrogatory No. 1:

What is your name and where do you reside now?
Answer to interrogatory No. 1:

My name is C. J. Alexander and I reside in Seattle, Washington.

Interrogatory No. 2:

What business were you following in the years of 1915, 1916 and 1917?

Answer to interrogatory No. 2:

I was engaged in the salmon packing business at Hoonah, Alaska, during the years 1915, 1916 and 1917.

Interrogatory No. 3:

Were you in anywise connected with the Hoonah Packing Company or any other company during the

(Deposition of C. J. Alexander.)

years 1915, 1916 and 1917, engaged in the salmon packing business near Hoonah, Alaska, or elsewhere in Alaska?

Answer to interrogatory No. 3:

I was vice-president of the Hoonah Packing Company and manager of the Hoonah cannery at Hoonah, Alaska, during 1915, 1916 and 1917.

Interrogatory No. 4:

If you answer the last interrogatory in the affirmative, state what connection you had with any such company or companies during the years 1915, 1916 and 1917? [421]

Answer to interrogatory No. 4:

See answer to interrogatory 3.

Interrogatory No. 5:

Did you during any of the time or times last above mentioned have any dealings with C. W. Young Company, a corporation of Juneau, Alaska, pertaining to the obtaining of refined or lubricating oils for yourself individually or any company you were at said times connected with?

Answer to interrogatory No. 5:

I do not believe that we bought any oil from the C. W. Young Company as agent of the Union Oil Company during 1915, 1916 and 1917. Mr. J. C. McBride, who was connected with the C. W. Young Company during that time had on a number of times solicited the business of the Hoonah Packing Company as to refined and lubricating oils from me personally, but he could never offer any guarantees of delivery and supplying our require-

(Deposition of C. J. Alexander.)

ments and so we never ordered any of such oil of that company (C. W. Young Company) during those years.

Interrogatory No. 6:

Did you know, during any of said years, that the C. W. Young Company was handling refined and lubricating oils for the Union Oil Company and selling the same?

Answer to interrogatory No. 6:

Mr. McBride during those years represented the fact to me that the C. W. Young Company was handling the oils of the Union Oil Company of California.

Interrogatory No. 7:

Did you know C. J. McBride during the years 1915, 1916 and 1917, who was during said time president of C. W. Young Company? [422]

Answer to interrogatory No. 7:

Yes.

Interrogatory No. 8:

Did you have any conversation with said McBride at any time during the last-mentioned years concerning obtaining from him, as representative of said C. W. Young Company, refined or lubricating oils?

Answer to interrogatory No. 8:

See answer to interrogatory 5.

Interrogatory No. 9:

If you had any conversations with said J. C. McBride concerning the matters mentioned in the last above question during said times, give the time.

(Deposition of C. J. Alexander.)

place and persons present as near as you possibly can.

Answer to interrogatory No. 9:

I would not attempt to give the time or the persons present, but they were had at the store or office of the C. W. Young Company.

Interrogatory No. 10:

If you state that you had any conversation concerning said lubricating and refined oils, state what that conversation was.

Answer to interrogatory No. 10:

I cannot answer this further than is set forth in my answer to interrogatory 5.

Interrogatory No. 11:

If you state that you had a conversation with J. C. McBride at any time during said years 1915, 1916 and 1917, did you order through him, orally, or otherwise, any refined or lubricating oils to supply the Hoonah Packing Company, yourself, [423] or any other company you were connected with?

Answer to interrogatory No. 11:

No.

Interrogatory No. 12:

Did you ever at any time during the times above mentioned order or agree to accept from J. C. McBride 50,000 gallons of refined oil for each year last above mentioned and 2500 gallons of lubricating oil?

(Deposition of C. J. Alexander.)

Answer to interrogatory No. 12:

I cannot recall the number of gallons, but I did promise J. C. McBride our business there which may have been or may not have been indefinite if he could have guaranteed the service we required, which he could not. I did not give any order for such goods because he could not or would not guarantee delivery.

Interrogatory No. 13:

Did you yourself contract or order for any of the companies you were connected with during said times above mentioned or for yourself individually, any lubricating or refined oils through said J. C. McBride or C. W. Young Company during said years? If so, state how much oils was ordered and at what time and for what companies you yourself so ordered.

Answer to interrogatory No. 13:

No.

Deposition of O. W. Carlson, for Plaintiff.

Direct Interrogatories propounded and Answers
Thereeto.

Interrogatory No. 1:

What is your name and where do you reside?

Answer to interrogatory No. 1:

My name is O. W. Carlson and I reside in Seattle, Washington. [424]

Interrogatory No. 2:

Q. What was your business during the years of 1915, 1916, and 1917 or either or all of said years?

(Deposition of O. W. Carlson.)

Answer to interrogatory No. 2.

Salmon packer in Alaska during all of said time.
Interrogatory No. 3:

Were you in anywise connected with any company engaged in the salmon packing business in Alaska during either or all of the last-mentioned years?

Answer to interrogatory No. 3:

Yes.

Interrogatory No. 4:

If you answer the last question in the affirmative, state what company or canneries you represented during either or all of said years and in what capacity you served such cannery or company or companies?

Answer to interrogatory No. 4:

In 1915 I was assistant manager of the Taku Canning & Cold Storage Company, at Taku Harbor, Alaska, but not thereafter until 1918. During 1916 and 1917 I was vice-president and general manager of the Auk Bay Salmon Canning Company, at Auk Bay, Alaska.

Interrogatory No. 5:

Did you represent or were you connected in any way with the Auk Bay Salmon Canning Company?

Answer to interrogatory No. 5:

See answer to interrogatory 4:

Interrogatory No. 6:

Did you know J. C. McBride and the C. W. Young Company during the years of 1915, 1916 and 1917, or any part of said times? [425]

Answer to interrogatory No. 6:

(Deposition of O. W. Carlson.)

I knew them both during all of said time.

Interrogatory No. 7:

Did you yourself (not what others did) during any of the times last above mentioned, either orally or in writing, order for yourself or the company or companies which you represented, any refined or lubricating oils from C. W. Young Company or J. C. McBride of Juneau, Alaska?

Answer to interrogatory No. 7:

During 1916 the Auk Bay Salmon Canning Company purchased all of the refined and lubricating oils which it used of the C. W. Young Company. All of the oils so purchased were delivered as soon as ordered. To my recollection, said Auk Bay Salmon Canning Company did not purchase any oils of said Young Company during 1917. Other than above stated, I, myself, neither for myself nor for any of the companies which I represented, ordered no refined or lubricating oil of either said C. W. Young Company or said J. C. McBride, during the years 1915, 1916 and 1917.

Interrogatory No. 8:

If you answer the last question in the affirmative, state whether any such order was orally or in writing?

Answer to interrogatory No. 8:

Whatever orders were given and filled, as set forth in answer to interrogatory 7 were oral.

Interrogatory No. 9:

If it was orally, state the time and place and the people who were present and the wording of the

(Deposition of O. W. Carlson.)

order and the quantity of refined and lubricating oils ordered.

Answer to interrogatory No. 9:

As stated in answer to interrogatory 7, all orders given [426] were filled as soon as given. I have no recollection as to time, places, persons present, wording of orders, and quantities ordered, as to each of the orders given.

Interrogatory No. 10:

If any such orders were so made as indicated in the last above questions, and you state they were in writing, please attach same to this, your deposition and make it a part hereof.

Answer to interrogatory No. 10:

They were not in writing.

Judge WINN.—We now offer that in evidence.

**Deposition of Frederick Howard Bailey, for
Plaintiff.**

Direct Interrogatories Propounded and Answers
Thereeto.

Direct Interrogatory No. 1.

What is your name and where do you reside?

Answer to interrogatory No. 1:

Frederick Howard Bailey, Bellingham, Washington.

Interrogatory No. 2:

What was your business during the years 1915, 1916 and 1917 or either or all of said years?

Answer to interrogatory No. 2:

I was boat man at Hoonah, Alaska, all of 1915. I was superintendent of Gambier Bay Cannery, Gambier Bay, Alaska, all of 1916 and 1917.

(Deposition of Frederick Howard Bailey.)

Interrogatory No. 3:

Were you in anywise connected with any company engaged in the salmon packing business in Alaska during either or all of the last-mentioned years?

Answer to interrogatory No. 3:

Yes, with the Hoonah Packing Company, which owns the Gambier Bay cannery, during all of 1916 and 1917. [427]

Interrogatory No. 4:

If you answer the last question in the affirmative, state what company or canneries you represented during either or all of said years and in what capacity you served such cannery or company or companies?

Answer to interrogatory No. 4:

See answer to interrogatory 3. The Hoonah Packing Company was the only company I worked for during those years. I was superintendent of the Gambier Bay cannery in 1916 and 1917.

Interrogatory No. 5:

Did you represent or were you connected in any way with the Gambier Bay Salmon or Packing Company?

Answer to interrogatory No. 5:

See answer to interrogatories 2, 3 and 4.

Interrogatory No. 6:

Did you know J. C. McBride and the C. W. Young Company during the years of 1915, 1916 or 1917 or any part of said times?

Answer to interrogatory No. 6:

Yes, during all that time.

(Deposition of Frederick Howard Bailey.)

Interrogatory No. 7:

Did you yourself (not what others did) during any of the times last above mentioned, either orally or in writing, order for yourself or the company or companies which you represented, any refined or lubricating oils from C. W. Young Company or J. C. McBride, of Juneau, Alaska.

Answer to interrogatory No. 7:

I never tried and never did make a contract with C. W. Young or J. C. McBride for lubricating or refined oils during that time, but we may have bought a few drums of oil from them during that time. [428]

Interrogatory No. 8:

If you answer the last question in the affirmative, state whether any such order was orally or in writing?

Answer to interrogatory No. 8:

The purchases mentioned in answer to interrogatory 7 were oral. There was no written contract that I know of.

Interrogatory No. 9:

If it was orally, state the time and place and the people who were present and the wording of the order and the quantity of refined or lubricating oils ordered.

Answer to Interrogatory No. 9:

Whatever refined or lubricating oils were ordered, if any, were delivered immediately and paid for at the end of the month.

Interrogatory No. 10:

If any such orders were so made as indicated in the last above questions, and you state they were in

(Deposition of Frederick Howard Bailey.)

writing, please attach same to this, your deposition and make it a part thereof.

Answer to interrogatory No. 10:

See answer to interrogatory 7.

Judge WINN.—We now offer that deposition, if your Honor please.

The COURT.—It may be received.

Deposition of P. H. McCue, for Plaintiff.

Direct Interrogatories Propounded and Answers
Thereeto.

Interrogatory No. 1:

What is your name and where do you reside now?

Answer to interrogatory No. 1:

My name is P. H. McCue and I reside at Seattle, Washington. [429]

Interrogatory No. 2:

What business were you following in the years of 1915, 1916 and 1917?

Answer to interrogatory No. 2:

Salmon canning in Alaska.

Interrogatory No. 3:

Were you in anywise connected with the Northwestern Fisheries Company, or any other company during the years 1915, 1916 and 1917 or engaged in the salmon packing business in Alaska?

Answer to interrogatory No. 3:

I was engaged in the salmon packing business in Alaska for the Northwestern Fisheries Company during the years 1915, 1916 and 1917.

(Deposition of P. H. McCue.)

Interrogatory No. 4:

If you answer the last interrogatory in the affirmative, state what connection you had with any such company or companies during the years 1915, 1916 or 1917?

Answer to interrogatory No. 4:

During 1915 I was superintendent of the Nushagak cannery at Bristol Bay, Alaska. During 1916 and 1917 I was general superintendent of all the Alaska canneries of the Northwestern Fisheries Company.

Interrogatory No. 5:

Did you during any of the time or times last above mentioned have any dealings with the C. W. Young Company, a corporation of Juneau, Alaska, pertaining to the obtaining of refined and lubricating oils for yourself individually or any company you were at said times connected with?

Answer to interrogatory No. 5:

No.

Interrogatory No. 6: [430]

Did you know during any of said years that the C. W. Young Company was handling refined and lubricating oils for the Union Oil Company and selling the same?

Answer to interrogatory No. 6:

No.

Interrogatory No. 7:

Did you know J. C. McBride during the years 1915, 1916 and 1917, who was during said time president of C. W. Young Company?

(Deposition of P. H. McCue.)

Answer to interrogatory No. 7:

No.

Interrogatory No. 8:

Did you have any conversation with said McBride at any time during the last mentioned years concerning obtaining from him as representative of said C. W. Young Company, refined or lubricating oils?

Answer to interrogatory No. 8:

No.

Interrogatory No. 9:

If you had any conversation with said McBride concerning the matters mentioned in the last above question during said times, give the time, place and persons present as near as you possibly can.

Answer to interrogatory No. 9:

I had no such conversation.

Interrogatory No. 10:

If you state that you had any conversation concerning said lubricating and refined oils, state what that conversation was?

Answer to interrogatory No. 10:

I had no such conversation. [431]

Interrogatory No. 11:

If you state that you had a conversation with J. C. McBride at any time during the said years 1915, 1916 and 1917, did you order through him, orally or otherwise, any refined or lubricating oils to supply the Northwestern Fisheries Company, yourself, or any other company you were connected with?

(Deposition of P. H. McCue.)

Answer to interrogatory No. 11:

No.

Interrogatory No. 12:

Did you ever at any time during the times above mentioned order or agree to accept from Mr. J. C. McBride, 50,000 gallons of refined oil for each year last above mentioned and 2,500 gallons of lubricating oil?

Answer to interrogatory No. 12:

No; nor any other amount of such refined oil or lubricating oil.

Interrogatory No. 13:

Did you yourself contract or order for any of the companies you were connected with during the said times above mentioned or for yourself individually, any lubricating or refined oils through said J. C. McBride or C. W. Young Company during said years? If so state how much such oils was ordered and at what time and for what companies you yourself so ordered.

Answer to interrogatory No. 13:

No.

Interrogatory No. 14:

If you state you did order any such products, was said order oral or written and how much, if any, of each product was delivered?

Answer to interrogatory No. 14:

I never placed such an order with said McBride or C. W. [432] Young Company during said time or at all.

State of Washington,
County of King,—ss.

I, R. G. Sharpe, a notary public in and for the State of Washington, residing at Seattle, do hereby certify that the above and foregoing depositions of C. J. Alexander, O. W. Carlson, Robert B. Bell, P. H. McCue, Frederick Howard Bailey and Archie W. Shiels, witnesses produced on behalf of the plaintiff in the above-entitled action were taken before me as follows: The depositions of Frederick Howard Bailey and Archie W. Shiels were taken on January 9, 1923, between the hours of 9 o'clock A. M. and 10 o'clock P. M. at the offices of the Pacific-American Fisheries, in South Bellingham, Whatcom County, Washington; the depositions of O. W. Carlson and P. H. McCue were taken on January 9, 1923, between the hours of 3 P. M. and 5 o'clock P. M., at room 710 L. C. Smith Building, Seattle, Washington; that the deposition of said Robert B. Bell was taken on January 10, 1923, between the hours of 10 o'clock A. M. and 11 o'clock A. M., at said room 710, L. C. Smith Building, Seattle, Washington; and the deposition of said C. J. Alexander was taken on January 11, 1923, between the hours of 11 o'clock A. M. and 12 M. at said room 710, L. C. Smith Building, Seattle, Washington; that each and all of said depositions were taken pursuant to stipulation and commission hereunto annexed; and that the answers to the foregoing interrogatories were reduced to writing by myself. That before proceeding to the exami-

nation said witnesses, C. J. Alexander, O. W. Carlson, Robert B. Bell, P. H. McCue, Frederick Howard Bailey and Archie W. Shiels and each of them were duly sworn by me to tell the truth, the whole [433] truth and nothing but the truth; that said depositions were carefully read by each of the respective witnesses and was then subscribed by said witness; that the written interrogatories numbered from one to fourteen inclusive set forth on pages six and seven hereof were propounded to the said witness, P. H. McCue, which witness did thereupon answer said written interrogatories as set forth on pages twenty-one and twenty-two hereof; that the written interrogatories numbered from one to fourteen inclusive set forth on pages eight and nine hereof were propounded to the said witness Archie W. Shiels, which witness did thereupon answer said interrogatories as set forth on pages twenty-four and twenty-five hereof; that the written interrogatories numbered from one to ten, inclusive, set forth on pages ten were propounded to said witness, Frederick Howard Bailey, which witness did thereupon answer said interrogatories as set forth on page twenty-three hereof; that the written interrogatories numbered from one to ten inclusive set forth on page eleven were propounded to said witness, O. W. Carlson, which witness did thereupon answer said interrogatories as set forth on pages seventeen and eighteen hereof; that the written interrogatories numbered from one to thirteen inclusive, set forth on pages twelve and thirteen hereof were propounded to said witness C. J. Alexander, which witness did thereupon

answer said interrogatories as set forth on pages fifteen and sixteen hereof; that the written interrogatories numbered from one to ten inclusive set forth on page fourteen hereof were propounded to said witness Robert B. Bell, which witness did thereupon answer said interrogatories as set forth on pages nineteen and twenty hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and [434] official seal this 11th day of January, 1923.

[Seal]

R. G. SHARPE,

Notary Public in and for the State of Washington,
Residing at Seattle.

Judge WINN.—We now offer the deposition of Mr. McCue.

The COURT.—It may be received.

Judge WINN.—The plaintiff rests.

Whereupon the defendant, to further maintain the issues on its part, introduced the following evidence, to wit:

IN SURREBUTTAL.

Testimony of J. C. McBride, for Defendant (In Surrebuttal).

J. C. McBRIDE, recalled, having been previously sworn, testified as follows:

Direct Examination.

(By. Mr. FAULKNER.)

Q. Do you know Mr. McCue? A. No, sir.

Q. Did you ever know him? A. No, sir.

Q. Did you ever say anything to him about selling any oil to him in this case?

(Testimony of J. C. McBride.)

A. I never saw the man.

Q. You did mention McHugh to me in this case before? A. Yes, sir.

Q. Is that the same man? A. No, sir.

Q. How do you spell his name?

A. Well, T. C. McHugh spells his name M-c-H-u-g-h.

Q. And this McCue you say you don't know?

A. No, sir.

Q. Now, Mr. Bailey stated that he didn't give you any orders. [435] for oil in the year 1917 which were not filled. Is that so?

A. No, sir.

Judge WINN.—Now, wait; wait. If your Honor please, this is not proper surrebuttal. They went over what Mr. Bailey had ordered in Mr. McBride's direct testimony and covered it completely. Mr. Bailey is mentioned in the bill of particulars and Mr. Faulkner took the bill of particulars—

Mr. FAULKNER.—(Interrupting.) I'll withdraw the question to save time.

Q. Mr. Bell gave a deposition here?

A. Yes, sir.

Q. Now, I think you mentioned having arrangements to sell oil to the Astoria & Puget Sound Canning Company? A. Yes, sir.

Q. With whom did you have those arrangements?

Judge WINN.—Now, wait, if your Honor please. Mr. McBride has testified on his direct examination—it appears in his deposition that was formerly taken in this case, that for this company that Mr.

(Testimony of J. C. McBride.)

Faulkner has just asked him about, that he had some conversation with Robert Bell, and all conversations were gone into by him on his direct examination. We have offered the deposition of Mr. Bell to deny what Mr. McBride said, and there is no surrebuttal to this.

Mr. FAULKNER.—That is a little different.

Judge WINN.—I don't see how it can be a little different.

Mr. FAULKNER.—Mr. McBride testified that they did come to him and promise him their business. The depositions are a little different from that. But so far as Mr. Bell is concerned, the testimony of Mr. Bell is that he did come in for some oil in 1915 and couldn't get it. Now, we didn't say [436] anything about that. That is not in the bill of particulars. That is clear out of the bill of particulars altogether, and Mr. McBride hasn't testified about it in his direct or cross-examination. That is something that Mr. Bell has brought in and I want to examine him about the whole transaction relating to those years with the Astoria & Puget Sound Canning Company. We only had two years; now they have brought in a transaction in 1915 and I want to show the whole transaction and with whom the conversations were had, if I may be permitted.

The COURT.—Now, what does the bill of particulars show?

Mr. FAULKNER.—1916 and 1917.

The COURT.—And this deposition says 1915?

(Testimony of J. C. McBride.)

Mr. FAULKNER.—1915.

The COURT.—Well, then, if that is what the purpose of the evidence is, I would like, then, to confine it to the year 1915 and not to 1916 and 1917, because it was gone into before.

Mr. FAULKNER.—The question is confined to 1915.

Q. What conversation did you have with Mr. Bell in the year 1915, Mr. McBride?

A. I asked him about selling him oil in 1915.

Q. What was he doing then?

A. He was superintendent of the cannery, Astoria & Puget Sound cannery.

Q. Now what, if any, agreements did you make with him then, for those three years?

Judge WINN.—Just hold on. If your Honor please, they have set forth in their bill of particulars, they are only seeking to recover, as set forth in the bill of particulars, for [437] the years 1916 and 1917, for the Puget Sound & Astoria Canning Company. Now, then, that was set forth in the bill of particulars and the direct examination. They confine their contract to 1916 and 1917, and the testimony and evidence of Mr. McBride is that he had his contract with Mr. Bell. Now, then, they are going back to something in 1915, which is not included in the bill of particulars. It is, therefore, immaterial and incompetent under the issues of the case and it is not proper surrebuttal testimony.

The COURT.—Well, do you remember the testimony of Mr. McBride?

(Testimony of J. C. McBride.)

Judge WINN.—I remember the testimony of Mr. McBride that his conversation was with Robert Bell.

The COURT.—In 1915—?

Judge WINN.—For the years 1915, 1916 and 1917, and they predicated their action—they claimed that they had a contract with Robert Bell to furnish that cannery with oil for those years. That is the testimony and the evidence and that is the bill of particulars.

The COURT.—Well, you have stated your objection. I'll hear from the other side.

Mr. FAULKNER.—Whether it is or not, I think Mr. McBride ought to be able, in surrebuttal, to explain those transactions with that company. Now, it has been brought out by Mr. Bell that he did have an order here in 1915 which couldn't be filled. Now, Mr. McBride might be mistaken about some detail of that transaction which I think he ought to be allowed to explain to the Court and jury.

The COURT.—I'll overrule the objection. [438]

Q. Now, explain that transaction with the Astoria & Puget Sound Canning Co.

Judge WINN.—The same objection.

A. For 1915?

Q. Yes.

A. Well, I had a conversation with Mr. Bell in 1915 regarding the selling to him of refined oil and lubricating oil.

Q. For how many years? A. Three years.

Q. Now, in 1916, did you have any— You stated,

(Testimony of J. C. McBride.)

I think, on your direct examination that in 1916 you had some arrangements to sell that company oil, about which you had another conversation with Mr. Bell? A. Yes, sir.

Q. Now, is that correct?

A. No. In making that statement, that wasn't correct.

Q. Now, how did you arrive at that, that that—

Judge WINN.—I object to it, if your Honor please.

Q. Have you any memorandum?

Judge WINN.—I object to the witness testifying to any memorandum that he may have in his hand, until he can say what it is. Now, if Mr. McBride testified before on the witness-stand that he had this conversation with Mr. Bell in 1916, Mr. Faulkner would not be permitted to impeach his own witness by bringing him back on the witness-stand and say that that story isn't true, that he had some other conversation or story—

The COURT.—(Interrupting.) He can correct his testimony at any time. Objection overruled. [439]

Q. Now, Mr. McBride, what was the correct statement of the agreement for 1916? With whom did you have that?

A. That was with Mr. Edwards, the gentleman who took Mr. Bell's place.

Q. When you stated Mr. Bell—

Judge WINN.—Now, if your Honor please, wait a minute. We object to it now or to any other con-

(Testimony of J. C. McBride.)

versation, for the reason that it would evidently take us by surprise, because Mr. McBride testified before in this case by deposition, on my request, which was taken before Mr. Folta. Now, then, he testified in this case that the only conversation he had to furnish the Astoria & Puget Sound cannery was with Robert Bell. He came on the stand yesterday or day before yesterday and he said that his conversation or dealings were with him. Now, then, I took Mr. Bell's deposition because he was in the bill of particulars and because Mr. McBride testified that he had his conversation with him. Now, he has switched off to some other man, and I think it is not rebuttal and it is unfair; it is an unfair advantage to take of the plaintiff at this time and stage of the case. It is not surrebuttal and it is not in the bill of particulars in this case.

The COURT.—Objection overruled. You may state. A. Mr. Edwards.

Q. Who? A. Mr. Edwards.

Q. Who was Mr. Edwards?

A. He was superintendent of the Astoria & Puget Sound Canning Company.

Q. Now, Mr. McBride, in making out this contract of 1915, what arrangements, if any, were made for your remittances to the [440] Union Oil Company for the oils that they had shipped you?

Judge WINN.—The same objection.

Q. What arrangement was made about remittances which you were to make to the Union Oil Company? A. Why, no—

(Testimony of J. C. McBride.)

Judge WINN.—(Interrupting.) Just a minute.

Mr. FAULKNER.—Would you like to hear from me on the objection?

The COURT.—No; I'll hear from the other side.

Judge WINN.—Oh, you are putting this on surrebuttal. Oh, well, possibly that may be surrebuttal.

Q. Well, answer the question, Mr. McBride. What arrangements were made with the Union Oil Company regarding the remittances you were to make to them for the oils they were to send you?

Judge WINN.—We wish to have it stated with whom he had the conversation.

The COURT.—Well, he will bring that out.

A. There wasn't any arrangement.

Q. What was that?

A. There wasn't any arrangement.

Q. When were you to remit for the oils that they were to ship you? A. After we had—

Judge WINN.—Object, if your Honor please, because the whole matter was gone into on direct examination.

The COURT.—Objection overruled.

Judge WINN.—He stated what the contract was and then we met it and said what we supposed it was. Now, I don't think it is proper rebuttal.

The COURT.—Objection overruled. There was nothing said about remittances.

Mr. FAULKNER.—It was brought out in rebuttal for the first time. [441]

(Testimony of J. C. McBride.)

Judge WINN.—He would have to confine it, if your Honor please, to some year.

The COURT.—Yes, I think the written contract—

Mr. FAULKNER.—(Interrupting.) I am going to take up both contracts.

Judge WINN.—He couldn't vary the terms of the written contract, your Honor. The written contract does provide—

Mr. FAULKNER.—I know it does.

Judge WINN.—Well, then I think he ought to confine the question to some particular contract. Find out what he is getting at.

(Question repeated at request of Court.)

The COURT.—You'll have to confine your question—

Q. At the time that you entered into the oral contract of 1915? A. No specific time set.

Q. No specific time set? A. No, sir.

Q. What was your custom— What was the manner of making these remittances? A. Well—

Judge WINN.—Object to it as not proper surrebuttal.

The COURT.—Objection overruled.

A. I remitted when I collected for the oil.

Q. Did you make your remittances promptly?

A. Yes, sir.

Q. Now, when you entered into the written contract which has been introduced in evidence here, did you change the system any?

(Testimony of J. C. McBride.)

Judge WINN.—I object to it, if your Honor please, because the written contract covers all these matters.

Q. I'll withdraw it and put it this way: Was there any difference between the terms of the written contract and the oral contract regarding remittances? [442]

Judge WINN.—We object to it, if your Honor please, because the written contract speaks for itself.

Mr. FAULKNER.—Of course, it does, but the oral one doesn't.

The COURT.—Objection overruled.

A. No, sir.

Judge WINN.—Well, it provides that remittances were to be made at a certain time.

The COURT.—The jury can draw their own conclusions.

Q. You say there was no difference?

A. No difference.

Q. Now, regarding the return of empty drums, what did you do regarding the return of empty drums? Did you return them promptly?

A. Yes, sir.

Q. How did you return those from Juneau?

A. On freight boats.

Q. Could you return them in any other way?

A. No, sir.

Q. Would passenger boats carry any drums?

A. No, sir.

Judge WINN.—Object to it as incompetent, irrelevant and immaterial.

(Testimony of J. C. McBride.)

The COURT.—Objection sustained.

Q. And you say you returned those as promptly as you could ship them down? A. Yes, sir.

Mr. FAULKNER.—That's all.

Cross-examination.

(By Judge WINN.)

Q. Now, this has been three times that you have testified in this case, hasn't it. You was on the witness-stand on direct testimony [443] and now you are on rebuttal or surrebuttal and you have testified before Mr. Folta in this case, when your deposition was taken here some months ago, when Mr. Faulkner was present and I was present. Isn't that true? A. Yes, sir.

Q. This is the first time, after you have testified three times, that you have ever testified that you had any conversation with a man by the name of Edwards, regarding furnishing the Puget Sound & Astoria Canning Company any refined or lubricating oil, isn't it? A. Yes, sir.

Q. That just occurred to you after we read the deposition of Bob Bell, did it?

A. I looked at my memorandum, one that I had in my pocket and I saw that I had Mr. Edwards' name on it. If I had had that memorandum when I gave you my deposition, I would have told you about Mr. Edwards. I'll have to admit that I had forgotten about Mr. Edwards.

Q. Well, you was asked by both Mr. Faulkner and myself? A. Yes.

(Testimony of J. C. McBride.)

Q. On one occasion by myself and on one occasion by Mr. Faulkner? A. Yes.

Q. As to whom you had the conversation with about furnishing the Puget Sound & Astoria Canning Company with oil, in one instance, or rather in both instances, you testified that the only conversation you had was with Mr. Bob Bell, didn't you?

A. Yes.

Q. Then you also did when you made out the bill of particulars in this case and swore to that, didn't you? A. Yes, sir.

Q. And in that bill of particulars you swore there that you were [444] to only furnish the Astoria & Puget Sound Canning Company oils during the years 1916 and 1917? You mentioned nothing about the year 1915, did you?

A. Yes, sir; if I had stopped to think, I would have known—

Q. (Interrupting.) I'm not asking you what you stopped to think. I am just asking you about what you swore to. A. Yes.

Q. Now, you want the Court and jury to believe this story that you are telling that you had a contract with Mr. Edwards to furnish the Puget Sound & Astoria Canning Company lubricating oil and refined oils for the year 1915, do you?

A. Yes, sir.

Q. You haven't got any more memoranda you want to look up and refresh your memory?

A. No, sir; no.

(Testimony of J. C. McBride.)

Q. Now, then, Mr. McBride, these various letters and telegrams which we exhibited to you to-day, when Mr. Kelley put you upon the witness-stand and which were offered in evidence as a part of the records and files of the C. W. Young Company, pertaining to the transactions between the Union Oil Company and the C. W. Young Company, were a part of the records and files of the C. W. Young Company during the dealings between those companies pertaining to their oils, both lubricating and refined? A. Yes, sir.

Q. Those are the same letters and telegrams that was furnished to us on demand that was made in open court yesterday, and you brought them from the office? A. Yes, sir.

Judge WINN.—I think that's all.

Redirect Examination.

(By Mr. FAULKNER.) [445]

Q. Judge Winn asked you, Mr. McBride, about omitting to put the Astoria & Puget Sound Canning Company's orders in the bill of particulars for the year 1915. Did they get the oil furnished them in that year? A. Yes, sir.

Mr. FAULKNER.—That's all. Defendant rests.

Judge WINN.—I have a written motion here that I want to hand in to the Court. This motion, if your Honor please, just bears out the other motions. I presume it will be overruled and denied, so just allow us an exception to it.

The COURT.—The motion is overruled.

Judge WINN.—Allow us an exception.

Adjourned until Thursday, Jan. 25, 1923, at 10 A. M.

Thursday, Jan. 25, 1923, 3 P. M.

Arguments by counsel for respective parties having been concluded, the Court instructed the jury as follows:

Instructions of Court to the Jury.

Gentlemen of the Jury:

The plaintiff, the Union Oil Company of California, by this action, is seeking to recover from the defendant, the C. W. Young Company, the sum of \$3738.17, with interest thereon, at the rate of eight per cent per annum, from September 10, 1918, on account of certain refined and lubricating oils and oil products sold by defendant as agent of and for the account of plaintiff, under a certain written contract entered into between plaintiff and defendant on February 14, 1917, which contract constituted defendant its agent at Juneau for the sale of certain of its oils and by-products, the terms of which contract will hereafter be more specifically referred to.

The plaintiff is also seeking to recover, by its second cause of action, as set forth in its complaint, the sum of \$2578.31 for goods, wares and merchandise, consisting of oils and its products [446] sold and delivered to defendant by plaintiff on the fifth day of October, 1918, with interest thereon

from November 10, 1918, at the rate of eight per cent per annum, to date, making the total sum demanded by plaintiff \$6316.48, with interest from the respective dates aforesaid.

The first item of \$3738.17 claimed by plaintiff, although alleged in the complaint, in plaintiff's first cause of action as for goods sold to defendant, is actually for the value of goods sold by defendant as plaintiff's agent, on behalf of plaintiff, under the contract above mentioned, the sale of which had not been accounted for by defendant to plaintiff.

The second item, as set forth in the second cause of action, that is, the sum of \$2578.31, with interest from November 10, 1918, is for oil shipped to defendant and not sold by it, but remaining on hand in defendant's possession at the termination of the agency and which was taken over by defendant at that agreed price.

In its answer to the plaintiff, defendant admits that the oils were delivered to it as alleged in plaintiff's complaint and that the values stated by plaintiff in its complaint are substantially correct, but denies that it was indebted to plaintiff on account thereof and to that end sets up a counterclaim for damages in the sum of \$9681.88, based upon alleged breaches of two contracts set up in its first and second affirmative answers and counterclaims.

I.

In support of plaintiff's claim, the plaintiff submitted testimony, which testimony is not controverted or denied by defendant, bearing out the allegations of the plaintiff that defendant was, on

August 18, 1918, indebted to plaintiff in the agreed sum of \$3738.17, being the balance due plaintiff for oils [447] and its derivatives sold by defendant as plaintiff's agent and for the account of plaintiff during the year 1918, and which sum was received by defendant, as plaintiff's agent, and had not been accounted for by defendant to plaintiff; also evidence that on or about October 5, 1918, the defendant bought from the plaintiff the balance of oils and its derivatives, belonging to plaintiff and consigned to defendant, remaining in defendant's possession at the termination of the agency, for the agreed price of \$2578.31, which last sum became due and payable November 10, 1918.

II.

I therefore instruct you that you should find, from the evidence, that the defendant was, on the dates mentioned, indebted to plaintiff on account of such sales as set forth in the first and second cause of action of plaintiff's complaint, in the amounts therein designated, and you should render your verdict accordingly unless you further find that defendant became entitled to damages by reason of a breach of the contracts, as set forth in defendant's first and second affirmative defenses and counterclaim; and if, under the instructions I shall hereafter give you, you should find that the defendant is entitled to damages because of the alleged breaches of contract, as set forth in defendant's answer, it will be your duty to assess the amount of said damage and offset the same against the amount admitted by defendant to be due to

plaintiff on account of the sales aforesaid; and the difference between the damages which may be so assessed by you and the amount so admitted by defendant to be due would be the basis of your verdict.

III.

The defendant, in its answer, sets forth two contracts [448] entered into between plaintiff and defendant, which it alleges were breached by plaintiff and by reason of such breach it claims compensatory damages for loss of profits. One of these contracts, the breach of which by plaintiff is alleged by defendant, is a written contract dated February 14, 1917, and admitted by both plaintiff and defendant to have been entered into on or about that date. This contract and its alleged breach and damages claimed therefor are set forth in defendant's first affirmative defense. A copy of the contract is attached to the complaint and also has been introduced in evidence and you will have it before you when you retire to consider the case. The other of these contracts is declared on and set forth in the second affirmative defense and counterclaim, together with the alleged breach thereof and demand for damages by reason of such breach. This oral contract is alleged to have been entered into by plaintiff and defendant in the month of January, 1915, and I shall call your attention to it first, because it is prior to the time of the written contract and the written contract was evidently a substituted continuation thereof, though somewhat different in terms.

IV.

The oral contract of January, 1915, as expressed in the second affirmative defense, provided that defendant was to act as agent of plaintiff for the sale of gasoline, distillate, coal oil, kerosene, lubricating oils and greases, in the Territory of Alaska, and by the terms thereof defendant agreed to furnish a dock, warehouses and storage facilities for the landing, storage and handling of such oils and greases, and plaintiff agreed to furnish sufficient storage tanks for the storage of same at Juneau, Alaska, and to supply defendant, at all times during the life of said contract, with sufficient oils and greases, and so forth, above mentioned, to satisfy and supply the demands of all the customers [449] defendant could procure within the Territory of Alaska; that, under the terms of said contract, the same was to remain in full force and effect for three years or until canceled by mutual consent or by either party giving the other thirty days' notice in writing of its intention to cancel the same; that under the terms of said contract the plaintiff promised to pay defendant commissions of one cent per gallon on all sales of gasoline, distillate, kerosene and so forth, and two cents per gallon on all sales of lubricating oils and one-half of one cent per pound on all sales of lubricating greases made by defendant.

V.

Defendant further asserts that it provided a dock and so forth, and at all times performed its part of the contract to be by it performed, and that while

it was in force, during the years of 1915 and 1916, procured orders for the sale of oils and greases mentioned within the Territory agreed upon in said contract, and pursuant to the terms thereof, which would have netted defendant commissions in the sum of \$9681.86, and that plaintiff failed and refused to supply defendant with said oils and greases to fill its said orders or net the defendant any portion of said commissions above mentioned.

VI.

I instruct you that all of said allegations set forth in defendant's second affirmative defense above mentioned, are denied by plaintiff in its reply, and therefore it is incumbent on the defendant to prove, by a preponderance of the evidence, that the contract aforesaid was as set forth in the complaint; that plaintiff breached the same by failing and refusing to supply defendant with oils and greases sufficient to satisfy and supply the demands of customers procured by defendant; that defendant thereby lost the anticipated profits on sales made by it and the amount of the [450] profits so lost, with reasonable certainty.

VII.

I instruct you that the breach of the contract is alleged by the defendant in its second affirmative defense, to be for the failure of the plaintiff to, at all times during the life of the contract, supply defendant with sufficient of the specified oils and greases to satisfy and supply the demands of the customers defendant could procure within the territory designated. And, if the defendant complied

with the terms of the contract on its part to be performed, and you find that the plaintiff entered into the contract as alleged and failed to supply the defendant with the specified oils and greases in sufficient quantities to satisfy and supply the demands of the customers that defendant procured within the territory designated, then it would be liable for such losses as defendant would have sustained by reason of such failure.

VIII.

I further instruct you, however, that under the contract as it is pleaded, the plaintiff was not required to keep on hand, at Juneau, Alaska, at all times, a sufficient supply of oils to meet all possible demands. The defendant, under the contract, was appointed the agent of the plaintiff for the sale of its oils and by-products, and the presumption is, under the general terms of the contract plead, that the defendant would notify the plaintiff of all orders or contracts for the sale of oil received by it and that deliveries would be made by plaintiff according to such notification.

IX.

In considering the contract in 1915, you should take into consideration the testimony of the witnesses and the letter of the plaintiff oil company to the defendant, of the date of March 1, [451] 1915, which is Defendant's Exhibit "A"; and from the evidence and such letter, determine the exact nature of the contract entered into between the parties, bearing in mind, however, that if the contract provides that the defendant was acting as

agent of the plaintiff for the sale of plaintiff's oil, it was its duty, as such agent, to notify the plaintiff of all sales and prospective sales of oils for delivery to customers; and further, unless the contract specifically provided, in terms, that the oils and compounds mentioned in the contract should at all times be kept on hand at Juneau, Alaska, for such sales as defendant might make, the defendant could not complain by reason of shortage in the amount of such oils at Juneau, except as to such oils as were not delivered to defendant after request or notification to plaintiff by defendant of such sales.

X.

I instruct you that if you should find from the evidence that under the contract of 1915 the plaintiff agreed to furnish defendant all the oils and products thereof mentioned in the contract, sold by defendant for delivery to customers during the life of the contract, and the defendant notified plaintiff of such sales or contracts of sale, whether oral or written and plaintiff failed or refused to deliver such oils or products, of the sales of which it was notified by defendant, then the plaintiff would be liable to defendant in compensatory damages for the amount of its commissions on oils sold or contracted to be sold by it and of which the plaintiff was notified.

XI.

I further instruct you that the plaintiff has denied entering into the contract as alleged by the defendant in its second affirmative defense, and the

burden is on the defendant to prove such contract and the terms thereof, and, unless you find, from [452] a preponderance of the evidence, that the contract as alleged in the affirmative defense mentioned, was entered into between plaintiff and defendant, you should find against the defendant on the issue as to the terms of the contract.

XII.

I instruct you that before a party to a contract can claim damages for a breach thereof by the other party, he must have fulfilled the terms and conditions of the contract on his part to be performed, unless such performance shall have been waived. If, therefore, you find from the evidence, that plaintiff failed to supply the defendant with oils for delivery to customers in accordance with the terms of the contract entered into between plaintiff and defendant in January, 1915, but that such failure was caused by the failure of the defendant to return drums to plaintiff or account for oils sold, if you find that it was required by the contract so to do, then the defendant cannot recover any damages for a breach of the contract of January, 1915, by plaintiff.

XIII.

I instruct you that the defendant is seeking, in this cause of action, to recover damages for the loss of anticipated profits on sales of oils made by it, and in considering such anticipated profits, you should consider only such contracts or agreements as were reasonably certain of execution, and should not indulge in estimates of profits or specu-

lations or conjectures of witnesses not based upon facts. The purpose of allowing damages in cases of this kind, is to compensate the party injured by the breach of contract, for any loss he may have sustained thereby, and such damages must be capable of being estimated with reasonable certainty. Therefore, in this instance, which is for damages for loss of [453] anticipated profits, you should take into consideration only those contracts for sale of oils made by defendant which are certain and specific as to amount and as to the time of delivery and which, under the proof, you are reasonably certain would have been consummated had the goods been delivered to defendant by plaintiff, as provided by the contract, but failed because of non-delivery as required thereby. Mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase, without the expression of quantity or value and opinions as to what sales could or probably would have been made but for the alleged breach of the contract by plaintiff, all fall within the category of speculative, uncertain and remote profits and do not, of themselves, show a right of recovery and defendant cannot recover therefor. You, therefore, should consider only such contracts as you are satisfied from the evidence, are reasonably certain as to the amount and date of the consummation thereof. Mere indefinite promises are matters of speculation and cannot be made the basis of a claim for damages.

XIV.

Now, turning to the first affirmative defense and counterclaim of defendant, we find that this is based upon an alleged breach by plaintiff of the written contract dated February 14, 1917, and, according to the allegations of said affirmative defense, the breach is that the plaintiff did not furnish defendant with oils, and so forth, sufficient for the ordinary requirements of the trade at Juneau. The contract is set forth as an exhibit, attached to plaintiff's complaint; is also admitted in evidence as exhibit No. 1 and is admitted by both parties to have been executed by them. This written contract provides that the plaintiff, the first party in said contract; constitutes the defendant, the [454] second party in said contract, its agent for the sale of its products, consisting of oils and its compounds at Juneau, Alaska; that the authority of the agent, so far as the first party is concerned, is limited to the terms of the written contract; that the plaintiff, the first party of the instrument, agrees to deliver the above-described products to the second party, the defendant herein; f. o. b. Juneau, the same to be in tank cars, iron barrels, drums, cases or packages, and for all the ordinary requirements of the territory referred to in said clause two; that is to say, at Juneau, Alaska; the sales to be made by the second party to be for cash on delivery in accord with written prices furnished by the first party, and no delivery to be made on credit without written authority of the

first party; the second party to make report of the sales as required by the first party.

The contract further provides that the second party is to make all retail deliveries and promptly account for all shipments made to it by the first party, and that any loss in excess of two per cent for leakage, or otherwise, shall be paid for by the second party within ten days after the close of each month's business; that it is understood and agreed that said second party, the defendant herein, shall furnish, at his expense, such storage facilities as may be satisfactory to the first party, the plaintiff herein, and necessary for the proper handling and care of such goods as are shipped to the second party under said contract.

Then follow provisions for compensation of the second party at a certain rate per gallon of oil and per pound of grease and for payment of compensation not later than the tenth of each month; and that the agreement may be canceled on fifteen days' notice; otherwise to remain in force for one year.

The provision in this contract that the plaintiff should [455] deliver oil in tanks, iron barrels, etc., for the ordinary requirements of the territory designated as Juneau, Alaska, means that the said party should deliver the oil specified in the manner designated, as might ordinarily be needed for sale at Juneau by defendant, and upon this stipulation of the written contract the claim of the defendant for damages is based, it alleging neglect and failure on the part of the plaintiff to deliver, during the year 1917, oils and by-products referred to in the

contract, sufficient in quantity to supply the ordinary requirements of the territory at Juneau, Alaska, and that by reason of such failure, it lost the sale of the products referred to and its commission thereon, as provided in the contract.

XV.

It is therefore necessary, first, for you to consider whether the plaintiff did or did not deliver at Juneau oils and products for the ordinary requirements of the territory during the year 1917. As to the breach of the stipulation, upon which the defendant bases his cause of action for damages, if, from the evidence or lack of evidence, you find that the plaintiff did deliver oil and its products sufficient for the ordinary requirements of the trade at Juneau, then you need not consider this affirmative defense further and render your verdict thereon against the defendant. But if, from the evidence, you find that the plaintiff failed to deliver oil and by products specified in the contract, sufficient for the ordinary requirements of the territory designated as Juneau, then you should consider whether or not any sales of refined or lubricating oils were lost to defendant by reason of such failure to deliver the oils and its products at Juneau, sufficient for the ordinary requirements thereof. [456]

XVI.

You are instructed that the theory of the law is to award compensation for gains prevented and for losses sustained when a contract is broken, and a person breaking a contract is liable in damages for the direct, natural and proximate results of

his act. The party damaged is not precluded from recovering anticipated profits merely because they are such, as loss of anticipated profits is a damage that should be compensated for just as much as the destruction of property.

XVII.

If the business, of which the defendant, the C. W. Young Company was deprived of, if you find from the evidence that the defendant was deprived of certain business, by reason of the failure of the plaintiff, the Union Oil Company, to furnish sufficient oils to meet the ordinary requirements of the trade at Juneau, was contemplated or reasonably could have been contemplated by the parties at the time of making the contract, and if it is reasonably certain that a gain or benefit would have been derived, and if it is reasonably certain that a loss was suffered by the defendant, by reason of the failure of the plaintiff to deliver such oils at Juneau as contemplated by the contract, then damages may be recovered by the defendant against the plaintiff for the amount of such loss. Uncertainty as to the amount of damages does not prevent recovery, if it is reasonably certain that a gain or benefit to defendant has been prevented by the breach of the contract on the part of the plaintiff, then the defendant, the C. W. Young Company, is entitled to damages for the amount of that gain or benefit, and it is for you to fix the amount of such damage, if proved with reasonable certainty.

[457]

XVIII.

Much testimony has been submitted to you,

showing the relations of the parties, plaintiff and defendant, during the year 1917, and the prior period, 1915 and 1916, covered by the oral contract aforesaid. This testimony was allowed to be submitted to you to enable you to determine whether the plaintiff breached the contracts as alleged by the defendant; and, further, if either contract was breached by the plaintiff, as alleged, whether any damage resulted to defendant by reason of loss of commissions on sales made or contracted to be made by defendant for the plaintiff.

XIX.

As to the question as to what agreements or contracts made by defendant should be considered by you as a basis for determining a loss to defendant, if you should find that the plaintiff breached the contract of February 14, 1917, or the oral contract of 1915, I instruct you that you should consider only such contracts or applications to purchase, if there are any shown by the evidence to have been made by the defendant with third parties, as from the circumstances and facts shown by the testimony reasonably would amount to contracts for the sale or application to purchase specific quantities of products referred to in the contracts.

XX.

In this case the C. W. Young Company complains that it was deprived of certain profits which were contemplated by both parties to the contract, and you are instructed that if you find from the evidence, that the contract was entered into in the early part of 1915, as claimed by the defendant,

the C. W. Young Co., the nature of this agreement between the parties established the fact that [458] benefits and profits which the C. W. Young Company was to make upon the sales of the oils and products of the plaintiff, the Union Oil Company, were contemplated by the parties at the time the contract was made, and therefore, if you find that the contract was entered into as claimed by the defendant, the C. W. Young Company, in the early part of 1915 and continued during the years 1915, 1916, 1917 and until August 24, 1918, whether said contract was written or oral, then the only thing further for your consideration would be whether the contract was violated by the Union Oil Company, and whether the violation resulted in loss of profits to the defendant, the C. W. Young Company; and if you find from the evidence such to be the case—that is, that the contracts were entered into and remaining in force during the period mentioned and that they were violated by the Union Oil Company—then it will be for you to determine the amount of damages resulting to the C. W. Young Company from lost profits on sales which could have been made but for the violation of the contracts by the Union Oil Company.

XXI.

It is conceded by both parties that the C. W. Young Company was to receive a commission of one cent per gallon on all refined oils sold by it and two cents per gallon on all lubricating oils; so in computing such damages or lost profits, you will simply find the number of gallons of refined oil which could have been sold by the defendant but

for the violation of the contract by the plaintiff, if you find there was such violation, and multiply this by one cent, and then the number of gallons of lubricating oil that could have been sold by defendant but for such violation on the part of plaintiff, if you find there was such violation of the [459] contract, and multiply this by two cents and add together the amount of the commissions on the refined oil and the commissions on the lubricating oils. If you find this to be more than the sum of \$6,316.48, you will deduct from such amount of said commissions the sum of \$6,316.48, and find a verdict for the defendant, the C. W. Young Company, for the balance. If, on the other hand, of course, you find that such commissions and lost profits to be less than \$6,316.48, you will subtract such sum from the sum of \$6,316.48 and find a verdict in favor of the plaintiff for the balance.

XXII.

I instruct you that evidence of contracts for the sale of oil to third parties made by defendant, or applications for the sale of oil, during the years covered by the two contracts mentioned in the affirmative answer of defendant, was presented before you for three reasons only. The first was to enable you to determine whether or not the plaintiff breached the written contract set forth in the third affirmative answer and counterclaim of defendant, by failing to furnish or deliver to the defendant oils or its by-products ordered by defendant under said contract; second, to enable you to determine whether the defendant breached the written con-

tract of February 14, 1917, by failing to deliver to defendant sufficient oils or by-products thereof, needed for the ordinary requirements of the trade; and upon this question you should take into consideration all the evidence submitted as to deliveries made by the plaintiff, the several contracts entered into between the parties; the amounts of oil on hand at various dates; the failure of delivery on sales made or applications for [460] purchase of oil, if any is shown by competent evidence, by reason of a lack of oil on hand at the various times set forth in the testimony, and such other facts as may directly bear on that point as shown by testimony covering the dealings between the parties to the contract during the period thereof. The third reason why evidence of sales and contracts of sales and applications for purchase during the years covered by the contract was admitted, was to enable you to determine, should you find there was a breach of the contract by plaintiff, without justification, the amount of sales and applications for purchase lost by the defendant by reason of such breach under the instructions I have herein given you.

XXIII.

You are further instructed that if you find that the defendant is entitled to damages by reason of the breach of the contracts between the plaintiff and defendant, that the amount of such damages is limited to the sum of \$9,681.88, and in no case can you find damages for the defendant above that amount by reason of the breach of the contracts as alleged in the plaintiff's affirmative answer.

XXIV.

I instruct you that anticipated profits, to be considered as an item of damage, must be shown with some degree of certainty; and you, as a jury, must be able to ascertain their amount without resorting to speculation or conjecture, and that estimates, speculations or conjectures of witnesses not founded upon actual facts or which are based solely on testimony that is entirely composed of speculations or conjectures that the party claiming damages believed that he would obtain a profit thereon, are insufficient. [461] Therefore, if the jury cannot from the testimony, with reasonable certainty, ascertain the amount of defendant's damage, without resorting to speculation or conjecture, your verdict should be for the plaintiff.

XXV.

You are instructed that your power of judging the effect of evidence is not arbitrary but to be exercised with legal discretion and in subordination to the rules of the evidence. You are not bound to find in conformity with the evidence of any number of witnesses which do not produce conviction in your minds, against a less number or against a presumption or other evidence satisfying your minds. A witness wilfully false in one part of his testimony may be distrusted in others. This is a civil case, and in all civil cases the affirmative of the issue must be proved. When the evidence is contradictory, the finding should be in accordance with the preponderance of the evidence. If weaker and less satisfactory evidence is offered when it appears that

stronger and more satisfactory was within the power of the party to produce, the evidence offered may be viewed with distrust.

XXVI.

In judging the weight to be given to the testimony of witnesses and their credibility, you may take into consideration the demeanor of the witness on the stand; his interest, if any, in the result of the trial; his relation thereto; the intelligence or want thereof of the witness; the opportunity or lack of opportunity for knowing the facts concerning which he may testify; the probability or improbability of his story; his apparent candor and fairness, or want thereof; and when witnesses directly [462] contradict each other, you should consider all the evidence in the case and after such consideration, determine which witness is the more worthy of credit, and give credit accordingly.

XXVII.

Finally, Gentlemen, you should consider this case solely upon the evidence and the instructions of the Court. This you on your oaths promised to do in entering upon the trial of this case. You should not be swerved in coming to your decision by friendship, sympathy, bias, prejudice or other personal motive, for or against either party to the action, but should base your verdict solely upon the evidence and the instructions I have given you. It is your duty to consider the evidence submitted on the issues carefully and conscientiously, for there is no appeal from your reasonable verdict based on the evidence. If the Court errs in its construction of the law or in the admission of evi-

dence, a remedy is afforded by law through appeal to a higher court to correct such error; but a finding of the jury on the facts is seldom disturbed on appeal. So bear this in mind. It is your duty to do exact justice to the parties to the action so far as you are able on the evidence submitted to you.

XXVIII.

I instruct you that if you cannot ascertain the amount of defendant's damage, if any, without resorting to speculation or conjecture, your verdict should be for the plaintiff.

XXIX.

You are instructed that under the terms and conditions of the contract of 1915, the defendant was not warranted in entering into any contracts or orders for the sale of either refined or [463] lubricating oils, the delivery of which was to be made in the future, and defendant cannot recover any sum as damages for loss of profits on such contracts or orders, unless such contracts or orders were confirmed by the plaintiff after notice thereof by defendant.

XXX.

The burden of proof in this case is upon the defendant to show, under the instructions, by a preponderance of the evidence or greater weight of evidence, that it is entitled, under the instructions given to you by the Court, to any offset or counterclaim against the amount which plaintiff claims is due it, under and by virtue of the amount claimed due the plaintiff by reason of the facts set forth in its complaint; that is, any amount, if

any, that you may find, under the instructions and evidence in this case, to be due and owing from plaintiff to defendant by reason of the facts set up in the third amended answer, must be established by a preponderance of the evidence before you could allow any such amount as an offset to the amount which plaintiff claims that is due under and by virtue of the allegations as set forth in its complaint.

XXXI.

If you find that the commissions upon sales which could have been made during said period of the contract by the defendant, but for the breach of the contracts on the part of the plaintiff, exceeded the amount claimed by plaintiff, to wit, the sum of \$6,316.48, then your verdict should be for the defendant for the amount of said commissions in excess of the sum of \$6,416.48.

XXXII.

It is for you to determine the terms of the oral contract [464] entered into between the plaintiff and defendant, if you find that such contract was entered into in the year 1915, and in determining whether or not such a contract was entered into, you may take into consideration all the testimony introduced upon this point, and you may consider the interpretation placed upon said contract by the plaintiff and defendant, and the acts of the plaintiff and defendant in their relations to each other during said period, and you may also take into consideration all the correspondence between the plaintiff and defendant bearing upon this point.

XXXIII.

In computing the amount of commissions which defendant would have made but for the breach of the written contract by the plaintiff if you would find that the defendant would have made additional commissions, you may take into consideration any admissions made by plaintiff, the Union Oil Company, acknowledging its inability or failure to supply and furnish the defendant with sufficient oils as before mentioned to meet the ordinary requirements of the territory referred to.

XXXIV.

Under contracts, such as mentioned in the evidence and testimony in this case, and set up by the defendant, it is not necessary for the defendant to prove to a mathematical certainty all the items of damage claimed by it. It is sufficient for the defendant to prove that it could have sold oils, etc., in addition to the oils actually sold by it, provided you find that defendant was prevented from making said sales through the failure of the plaintiff to comply with the terms of the contract and through the failure of the plaintiff to furnish said oils.

XXXV.

It is for you to say, after considering all the evidence, [465] the amount of damage, if any, sustained by the defendant C. W. Young Company through plaintiff's alleged breach of the contracts; provided such amount is not in excess of \$3,365.38, being the difference between the amount claimed by defendant as damages and the amount admitted due plaintiff for sales of oil.

The COURT.—That is rather indefinite.

Mr. FAULKNER.—Yes; that was indefinite.

XXXVI.

You, Gentlemen, will be handed two forms of verdict—one in favor of the plaintiff and one in favor of the defendant in each case. If you find in favor of the party referred to in the verdict, you will assess the amount of his recovery. If you find for the plaintiff, you will allow interest in the amount prayed for in the complaint, at the rate of eight per cent per annum on each of the several items. If you find for the defendant, you will find such damages as the defendant has sustained and deduct therefrom what has been admitted to be due plaintiff and render your verdict accordingly.

Whereupon, before the jury retired, the defendant, by his counsel took the following exceptions to the instructions of the Court:

Mr. FAULKNER.—The defendant excepts to the instruction given by the Court to the effect that the plaintiff did not undertake to keep the defendant supplied with sufficient oils on hand to supply the trade it could procure, or the business it could procure; and we except to the instruction of the Court, giving the definition of speculative damages; and the defendant excepts to the instruction that the defendant was not warranted in entering into any contracts or agreements for future delivery of oils, under the contract of 1915, unless the sales were confirmed.

Which was all the testimony adduced or proceedings had in [466] the case.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL CO. OF CALIFORNIA, a Corporation,
Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Certificate of Reporter.

I, George W. Folta, the official court reporter who reported the proceedings and testimony in the trial of the above-entitled cause, hereby certify that the foregoing is a full, true and correct transcript of all the proceedings and testimony, both oral and documentary, offered and introduced in the trial of the foregoing action, and also of all exceptions taken and noted, together with the instructions given in the charge of the Court to the jury, together with all exceptions thereto; and I now certify the foregoing, consisting of 434 pages, to be such transcript.

In testimony whereof, I have hereunto signed my name at Juneau, Alaska, this twelfth day of April, 1923.

GEORGE W. FOLTA,
U. S. Court Reporter. [467]

Certificate of Judge to Bill of Exceptions.

And because the above and foregoing matters do not appear of record, I, Thos. M. Reed, the Judge

before whom said cause was tried, do hereby certify that the above and foregoing is a full, true and correct bill of exceptions, and contains all the evidence proposed on the trial of said cause, and I further order the said bill of exceptions to be filed and made a part of the record herein.

Done this 5th day of May, 1923, at Juneau, Alaska.

THOS. M. REED,

Judge. [468]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

The C. W. Young Company, a corporation, the defendant herein, conceiving itself aggrieved by the final judgment of the Court entered herein on February 1st, 1923, and having filed its assignments of error herein, prays the Court to allow it a writ of error from the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of security which it shall give at a supersedeas to said judgment on such writ of error.

H. L. FAULKNER,

Attorney for Defendant.

Writ of error allowed. Supersedeas bond fixed at \$11,000.00.

Dated this 14th day of March, 1923.

THOS. M. REED,
Judge.

Service admitted this 14th day of March, 1923.

WINN & OOGHE,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Mar. 14, 1923. John H. Dunn,
Clerk. By ———, Deputy. [469]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Assignments of Error.

Comes now the defendant and assigns the following errors committed by the Trial Court during the progress of the trial of this cause and in the rendition of the final judgment, and upon which the defendant will reply in the Appellate Court for a reversal:

I.

The Court erred in rejecting the evidence offered by defendant to prove the cost and expense of furnishing and maintaining the necessary dock, warehouse and storage facilities for storing the lubricating oils, greases, etc., under the contract of 1915.

II.

The Court erred in rejecting the evidence of defendants as to the general business conditions of the trade in the Territory of Alaska and in the vicinity of Juneau during the years covered by the contracts mentioned in the pleadings.

III.

The Court erred in giving Instruction No. VIII to the jury, which said instruction is as follows:

“I further instruct you, however, that under the contract it is pleaded, the plaintiff was not required to keep on hand, at Juneau, Alaska, at all times, a sufficient supply of oils to meet all possible demands. The defendant, under the contract, was appointed the agent of the plaintiff for the sale of its oils and by-products, and the presumption is, under the general terms of the contract plead, that the defendant would notify the plaintiff of all orders or contracts [470] for the sale of oil received by it and that deliveries would be made by plaintiff according to such notification.”

IV.

The Court erred in giving Instruction No. IX to the jury, which said instruction is as follows:

“In considering the contract of 1915, you should take into consideration the testimony of the witnesses and the letter of the plaintiff Oil Company to the defendant, of the date of March 1, 1915, which is Defendant’s Exhibit ‘A’; and from the evidence and such letter, determine the exact nature of the contract entered into between the parties, bearing in mind, however, that if the contract says that the defendant was acting as agent of plaintiff for the sale of plaintiff’s oil, it was its duty, as such agent, to notify the plaintiff of all sales and prospective sales of oils for delivery to customers; and further, unless the contract specifically provided, in terms that the oils and compounds mentioned in the contract, should at all times be kept on hand at Juneau, Alaska, for such sales as defendant might make, the defendant could not complain by reason of shortage in the amount of such oils at Juneau, except as to such oils as were not delivered to defendant after request or notification to plaintiff by defendant of such sales.”

V.

The Court erred in giving Instruction No. XIII to the jury, which said instruction is as follows:

“I instruct you that the defendant is seeking, in this cause of action, to recover damages for the loss of anticipated profits on sales of oils made by it, and in considering such anticipated profits, you should consider only such contracts or agreements as are reasonably certain of execu-

tion, and should not indulge in estimates of profits or speculations or conjectures of witnesses not based upon facts. The purpose of allowing damages in cases of this kind, is to compensate the party injured by the breach of contract for any loss he may have sustained thereby, and such damages must be capable of being estimated with reasonable certainty. Therefore, in this instance, which is for damages for loss of anticipated profits, you should take into consideration only those contracts for sale of oils made by defendant which are certain and specific as to amount and as to the time of delivery, and which, under the proof, you are reasonably certain would have been consummated had the goods been delivered to defendant by plaintiff, as provided by the contract, but failed because of nondelivery as required thereby. Mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase, without the expression of quantity or value, and opinions as to what sales could or probably would have been made but for the alleged breach of the contract by plaintiff all fall within the category of speculative, uncertain and remote profits and do not, of themselves, show a right of recovery, and defendant cannot recover therefor. You, therefore, should consider only such contracts as you are satisfied from the evidence, are reasonably certain as to the amount and date of the consummation thereof. Mere indefinite promises are

matters [471] of speculation and cannot be made the basis of a claim for damages.”

VI.

The Court erred in giving plaintiff's requested Instruction No. IV, contained on page 5 of the instructions submitted by the plaintiff, which said instruction is as follows:

“Should you fail to find in favor of the plaintiff, according to the last instruction above given you, then it would become your duty to consider the question of the counterclaims or offsets set up in the third amended answer by the defendant, and I instruct you in respect thereto that anticipated profits, to be considered as an item of damage, must be shown with some degree of certainty, and the jury must be able to estimate their amount without resorting to speculation or conjecture. Mere estimates, speculations or conjectures of witnesses, not founded upon actual facts, or testimony that the plaintiff thinks or calculates that he would have been able to sell a certain amount, are insufficient.”

VII.

The Court erred in giving plaintiff's requested Instruction No. XIII, contained on page 13 of the instructions submitted by the plaintiff, which said instruction is as follows:

“The jury is instructed that under the terms and conditions of the contract of 1915, the defendant was not warranted in entering into any contracts or orders for the sale of either refined or lubricating oils, the delivery of which was to

be made in the future, and defendant cannot recover any sum as damages for loss of profits on such contracts or orders, unless such contracts or orders were confirmed by the plaintiff after notice thereof by defendant."

VIII.

The Court erred in overruling defendant's motion to set aside the verdict and grant a new trial herein.

H. L. FAULKNER,

Attorney for Defendant.

Service admitted March 14, 1923.

WINN & OOGHE,

Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 14, 1923. John H. Dunn, Clerk. By ———, Deputy. [472]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judges of
the District Court of Alaska, Division Number
One, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is before you, wherein the Union Oil Company of California, a corporation, is plaintiff, and the C. W. Young Company, a corporation, is defendant, a manifest error hath happened to the great damage of the said C. W. Young Company, a corporation, as by its petition doth appear.

We being willing that error, if any hath happened, shall be duly corrected and speedy justice done to the parties in that behalf, do command you, if judgment be given therein, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things pertaining thereto to the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, so that you have the same before our said Court on or before thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what *if* right, according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the

seal of the District Court of Alaska, [473] Division Number One, affixed at Juneau, this 14th day of March, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

Allowed March 14th, 1923.

THOS. M. REED,
Judge.

Service admitted this 14th day of March, 1923.

WINN & OOGHE,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 14, 192—. John H. Dunn, Clerk. By ———, Deputy. [474]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, C. W. Young Company, a corporation, as principal, and the National Surety Company, a corporation organized under the laws of the State of

New York and doing business in Alaska, as Surety, are held and firmly bound unto the above-named Union Oil Company of California, a corporation, plaintiff, in the sum of Eleven Thousand (\$11,000.00) Dollars, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents,

The condition of the above obligation, however, is such that WHEREAS the above-bounden C. W. Young Company, a corporation, defendant, has sued out a Writ of Error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in said cause on February 1st, 1923.

NOW, if the said C. W. Young Company, a corporation, shall prosecute its Writ of Error to effect, and pay all such damages and costs as may be awarded against it if it fail to make good its plea, then this obligation shall be null and void; otherwise to remain in full force and effect.

Dated at Juneau, Alaska, this 14th day of March, 1923.

C. W. YOUNG COMPANY, a Corporation.

By W. DeLONG, Manager,
Principal.

NATIONAL SURETY COMPANY.

[Corporation Seal]

By G. C. WINN,
Its Agent and Attorney-in-fact,
Surety. [475]

United States of America,
Territory of Alaska,—ss.

G. C. Winn, being first duly sworn, on oath deposes and says: That he is the attorney-in-fact and general agent of the National Surety Company, a corporation, the within named corporate surety; that said National Surety Company is engaged in and is authorized to engage in the surety business in the Territory of Alaska.

That the said corporation is worth more than the sum of Twenty-two Thousand (\$22,000.00) Dollars, over and above all its just debts and liabilities, and exclusive of property exempt from execution, and that it is accepted as surety by the United States Government on bonds in excess of the sum of Eleven Thousand Dollars.

G. C. WINN.

Subscribed and sworn to before me this 14th day of March, 1923.

[Notarial Seal]

J. H. HART,

Notary Public for Alaska.

My commission expires Nov. 13, 1926.

Approved to operate as supersedeas from the filing thereof.

THOS. M. REED,

Judge.

Copy received Mar. 14, 1923.

WINN & OOGHE,

Atty. for Pltff.

Filed in the District Court, District of Alaska, First Division. Mar. 14, 1923. John H. Dunn, Clerk. By ———, Deputy. [476]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to the Union
Oil Company of California, a Corporation, and
to Messrs. Cooney and Kelley and Winn and
Ooghe, Its Attorneys, GREETING:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit to be holden in the
City of San Francisco, State of California, within
thirty days from the date of this writ pursuant to
a writ of error in the clerk's office of the District
Court for Alaska, Division Number One, in a cause
wherein the Union Oil Company of California, a
corporation, is plaintiff in error, and the C. W.
Young Company, a corporation, is defendant in
error, and then and there to show cause, if any
there be, why the judgment in said writ of error
mentioned should not be corrected, and speedy
justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 14th day of March, 1923.

THOS. M. REED,
Judge.

Service admitted March 14, 1923.

WINN & OOGHE,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Mar. 14, 1923. John H. Dunn, Clerk. By ————, Deputy. [477]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

**Order Extending Time to File Record and Docket
Cause.**

It appearing to me, Judge of the above-entitled court, from the records and files herein, and particularly the order extending the time for settling the bill of exceptions until May 1, 1923, and from the affidavit of H. L. Faulkner, attorney for the defendant and appellant, C. W. Young Company,

that good cause exists for extending the time within which to file and docket said cause in the office of the Clerk of the United States Circuit Court of Appeals for a period of thirty days from the date of the expiration of the period mentioned in the writ of error and citation issued herein on March 14, 1923,

NOW, THEREFORE, on motion of H. L. Faulkner, attorney for the defendant and appellant, C. W. Young Company, it is hereby

ORDERED that the time for the filing of the record herein and the docketing of said cause with the Clerk of the United States *Circuit of Appeals* for the Ninth Circuit, at San Francisco, California, be, and the same is hereby, extended for a period of thirty days from and after the return day mentioned in said writ of error and citation.

Dated at Juneau, Alaska, this 15th day of March, 1923.

THOS. M. REED,
District Judge.

Copy received 15th day of March, 1923.

WINN & OOGHE,
Attorneys for Plff.

Filed in the District Court, District of Alaska, First Division. Mar. 15, 1923. John H. Dunn, Clerk. By L. E. Spray, Deputy.

Entered Court Journal No. S, page 87. [478]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including May 19,
1923, to settle Bill of Exceptions.**

Upon stipulation of counsel for both plaintiff-appellee and defendant-appellant,—

It is hereby ORDERED that the time for settling the bill of exceptions in the above-entitled cause be and the same is hereby extended to May 19, 1923.

Done in open court this 28th day of April, 1923.

THOS. M. REED,

District Judge.

O. K.—JNO. R. QUINN,

Atty for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Apr. 28, 1923. John H. Dunn,
Clerk. By ———, Deputy.

Entered Court Journal No. S, page 118. [479]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

**Order Further Extending Time to File Record and
Docket Cause in Circuit Court of Appeals.**

It appearing to me, Judge of the above-entitled court, from the records and files herein and from the order extending the time for settling the bill of exceptions herein until May 19, 1923, which said order is dated April 28, 1923, and from the stipulation of counsel for both plaintiff and defendant, filed herein, on April 28, 1923, that good cause exists for further extending the time within which to file and docket the said cause in the office of the Clerk of the United States Circuit Court of Appeals for a further period of thirty days from the date of the expiration of the period mentioned in the order extending time for filing the record in the said United States Circuit Court of Appeals, which was made and entered herein on March 15, 1923, and which extended said time for filing and

docketing said cause from April 13, 1923, for a period of thirty days;

NOW, THEREFORE, upon stipulation of counsel for both plaintiff and defendant, it is hereby ORDERED that the time for the filing of the record herein, and the docketing of said cause with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be and the same is hereby extended for a further period [480] of thirty days from and after the return day mentioned in said order of March 15, 1923, which makes a total extension of sixty days from and after the original return day mentioned in said writ of error and citation.

Done in open court this 28th day of April, 1923, at Juneau, Alaska.

THOS. M. REED,

District Judge.

O. K.—JNO. R. WINN,

Atty. for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Apr. 28, 1923. John H. Dunn, Clerk. By ———, Deputy. [481]

Entered Court Journal No. S, page 119.

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the District Court for the District
of Alaska, Division Number One, Juneau,
Alaska:

You will please make up a transcript of the record in the above-entitled cause, and include therein the following papers, to wit:

1. Complaint.
2. Third amended answer.
3. Reply.
4. Verdict.
5. Judgment.
6. Motion for new trial.
- 6-A. Order overruling motion for new trial.
7. Bill of exceptions.
8. Petition for writ of error.
9. Assignments of error.

10. Order allowing writ.
11. Writ of error.
12. Bond on writ of error.
13. Citation.
14. This praecipe.
15. Order extending time to file record.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

H. L. FAULKNER,
Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. Mar. 14, 1923. John H. Dunn, Clerk. By ———, Deputy. [482]

In the District Court for Alaska, Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Order Directing That Certain Papers, Pleadings, etc., be Made Part of Record to be Forwarded to Circuit Court of Appeals.

The motion of the plaintiff in the above-entitled case to make part of the record on the writ of error sued out in the above-entitled case by the above-named defendant to the U. S. Circuit Court of Appeals for the Ninth Circuit of San Francisco, certain pleadings, orders, demurrers, etc., which are material for the purpose of reviewing the above-entitled cause in said Circuit Court of Appeals, coming on for hearing this 28th day of April, 1923, and both parties being represented by their respective counsel, and the Court being fully advised in the premises, **ORDERS** that the following papers, pleadings, orders, demurrers, etc., now on file with the Clerk of this Court be made part of record to be forwarded to the said Circuit Court of Appeals on the said writ of error, to wit:

1. Bill of particulars made by defendant and relied on by defendant herein and served on plaintiff and filed in this case on the 30th day of Jan., 1922.

2. Motion to strike and make more definite and certain, etc., certain portions of the third amended answer which said motion was filed on March 15, 1922.

3. Order overruling the last above-mentioned motion by the above-entitled court, which order was filed and entered under date of July, 5, 1922.

4. Second and last demurrer filed to the third amended answer on Jan. 19, 1923, and order entered by the Clerk on the 19 day of Jan. 1923, overruling the said demurrer.

5. Instructions numbers 1, 2 and 3 offered and tendered the Court by plaintiff referring and defining what constitutes an account stated which were refused by the Court and are on file with the Clerk of this Court herein under date of 24 day of Jan., 1923.

6. Motion for a directed verdict after both plaintiff and defendant had rested their cases filed herein on the 24th day of January, 1922, and order denying and overruling the same made on the same date.

IT IS ORDERED that the Clerk of the above-entitled court make out and certify the above-mentioned records, papers, pleadings, etc., and attach them to and make the same a part of the record herein be forwarded on the writ of error to the said Circuit Court of Appeals of the Ninth District at San Francisco. [483]

Counsel for plaintiff having excepted to the disallowance by the Court of the remaining part of the above-mentioned motion, the Court hereby grants such exception;

And IT IS ALSO ORDERED that the above-mentioned motion is also, and is hereby ordered to be made, a part of the record by the Clerk of the above court.

Done in open court this 2d day of May, 1923.

THOS. M. REED,
Judge.

Filed in the District Court, Territory of Alaska,
First Division. May 2, 1923 Clerk, John H.
Dunn. By L. E. Spray, Deputy. [484]

Entered Court Journal S, pages 128, 129.

In the District Court for the District of Alaska,
Division No. One, at Juneau.

2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Bill of Particulars.

Pursuant to the order of the Court to submit bill of particulars showing the amount of commissions lost by defendant on account of failure on the part of plaintiff to comply with its contracts as set forth in defendant's affirmative defenses, said defendant submits the following bill of particulars:

ORDER RECEIVED AND NOT FILLED ON ACCOUNT OF DEFENDANT'S FAILURE TO SUPPLY OILS, ETC.

Union Oil Company of California.

539

Name	1915	Refined Oil		Lubricating		
		1916	1917	1915	1916	1917
Hoonah Packing Co., Hoonah.....	50,000	50,000	50,000	2,500	2,500	2,500
Hoonah Packing Co., Gambier.....			40,000			2,000
Taku Can & Cold Stor. Co.....	40,000	40,000	40,000	2,000	2,000	2,000
Chichagoff Mining Co.....		25,000	25,000		1,250	1,250
Auk Bay Salmon Canning Co.....			30,000			1,500
National Independent Fish.....	20,000	20,000	20,000	1,000	1,000	1,000
Pacific American Fisheries.....	30,000	30,000	30,000	1,500	1,500	1,500
James Davis.....	15,000	15,000	15,000	750	750	750
Hunter & Dickinson.....	5,000	5,000	5,000	250	250	250
Launch "Rolfe".....	2,000	2,000	2,000	100	100	100
Launch "Tillicum".....	1,000	1,000	1,000	50	50	50
"Anita Phillips".....	3,000	3,000	3,000	150	150	150
"Pete Madsen".....	2,500	2,500	2,500	125	125	125
"Morengen".....	5,000	5,000	5,000	250	250	250
"Gypsy".....	200	200	200	10	10	10
[485]						
Launch "Pacife".....	5,000	5,000	5,000	250	250	250
Launch "Olga".....	2,500	2,500	2,500	125	125	125
Launch "Orien".....	2,500	2,500	2,500	125	125	125
Launch "Carita".....	4,000	4,000	4,000	200	200	200
Scandinavian Grocery.....	15,000	61,000		750	1,750	
Launch "Elnido".....	1,500	1,500	1,500	75	75	75

Name	Refined Oil			Lubricating		
	1915	1916	1917	1915	1916	1917
Launch "Chlopeck"	2,500	2,500	2,500	125	125	125
Mike Koski, Launch "Caeser"	1,500	1,500	1,500	75	75	75
Fred Ramm, Launch "Dolphin"	3,000	3,500	3,500	150	175	175
Pillar Bay Packing Co.		1,650			82½	
Tenakee Fisheries		3,300			165	
Northwestern Fisheries		3,300			165	
Astoria & Puget Sound Can. Co.		30,000	30,000		1,500	1,500
George Naud			8,000			400
Valdez Packing Co.			19,320			966
Icy Straits Packing Co.			30,000			1,500
	<u>211,200</u>	<u>320,950</u>	<u>379,020</u>	<u>10,560</u>	<u>14,747</u>	<u>18,951</u>
Total—911,170 Gals. refined oil @ 1¢					\$9,111.70	
44,258 Gals. lubricating oil @ 2¢					885.16	
					<u>\$9,996.86</u>	

The amount of commissions lost on account of inability to fill the above orders are as follows:

Total Gals. of refined oil (911,170 @ 1¢ per gallon)	\$9,111.70
" " lubricating oil (44,008 @ 2¢ per gallon)	885.16
	<u>\$9,996.86</u>

J. C. McBRIDE.

Subscribed and sworn to before me this 30th day of January, 1922.

[Notarial Seal]

HENRY RODEN,
Notary Public for Alaska.

My commission expires July 24, 1922.

Filed in the District Court, District of Alaska, First Division. Jan. 30, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy.

Plff. Ex. "A." J. H. D. [486]

In the District Court for Alaska, Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Motion to Strike and Make More Definite and Certain Third Amended Answer.

Comes now the above-named plaintiff by Winn & Ooghe and Cooney & Kelley, its attorneys, and moves the Court to compel the defendant to strike from its third amended answer certain matters and allegations as hereinafter set out; to make its third amended answer more specific and definite and cer-

tain in respect as hereinafter set out; and to require defendant to serve on plaintiff a more particular, specific, and definite bill of particulars as hereinafter set out:

I.

To strike from paragraph IV of the first affirmative defense, all that portion which reads as follows, to wit:

“and that said facilities were procured and supplied at a cost to the defendant of \$15,425.91 and that defendant maintained the same during the life of said contract and agreement at an expense of \$3,969.48, making a total cost of the said storage facilities and their maintenance of \$19,395.39.”

for the reason that same is irrelevant, immaterial and redundant matter and furnishes no defense to the matters and facts set up in plaintiff's complaint.

II.

To strike from paragraph V of said first affirmative defense all that portion which reads as follows:

“that the same was to be paid (meaning the commission to be paid to defendant) as a consideration for the defendant's furnishing said storage facilities above mentioned.”

for the reason that the same is irrelevant, immaterial and redundant and no such terms or conditions are provided for in the contract which is attached to the complaint herein and admitted by the defendant. [487]

III.

Referring to paragraph VI of said first affirmative defense, plaintiff moves that the defendant be required to serve upon said plaintiff a more specific, definite and complete bill of particulars in that the said bill of particulars should set out in addition to the information already given, the dates of any orders which the defendant procured, the name and address of the parties so ordering, and the amounts and commodities so orders which said defendant was unable to fill by reason of the fault of plaintiff, and to state as to whether or not such agreements were oral or in writing, and if in writing, to serve which said bill of particulars, a copy of same; also to strike from said paragraph VI, all of that portion of paragraph VI which reads as follows, to wit:

“to net it (meaning defendant) commission upon said sales under the terms of said contract sufficient to reimburse the said defendant for all sums expended by it in the furnishing and maintenance of the facilities for the sale of said commodities.”

And further, that defendant be compelled to furnish a bill of particulars more definite and certain as above referred to, to that portion of said paragraph VI which reads as follows:

“Defendant procured orders for the sale of said oils and greases mentioned in said contract to net it a commission during the life of said contract and before the same was cancelled, of \$13,500.95.”

That said bill of particulars be made more definite and certain in stating whether said contracts of sale were in writing or oral and if in writing, set out a copy of same or serve plaintiff with a copy thereof; and to give the date and time and the kind of commodities to be furnished.

IV.

To strike from said first affirmative defense of said third amended answer all of paragraph VIII, for the reason that the same is irrelevant and immaterial and not a proper measure of damages in [488] said case.

Referring to the second affirmative defense set up in the third amended answer of defendant:

I.

This plaintiff moves to strike from paragraph IV of said second affirmative defense the following, to wit:

“at a cost of \$15,425.91”

for the same is immaterial, irrelevant and not a proper measure of damages under the terms and conditions of either the oral or written contracts referred to in the third amended answer, which contract or contracts were claimed to have been entered into by and between plaintiff and defendant.

II.

Referring to paragraph V of said second affirmative defense, plaintiff moves that defendant be compelled to make its bill of particulars or answer more definite and certain in that defendant should be compelled to state whether or not said alleged contracts entered into for the sale of commodities mentioned

therein were oral or in writing or to set the same out in the answer, and if the same are in writing, to furnish this plaintiff with a copy thereof; also to set out the dates of any orders which defendant procured, the name and address of the parties so ordering, and the amounts of commodities so ordered which said defendant was unable to fulfill by reason of the fault of plaintiff; to strike from said paragraph V that portion which reads as follows:

“Which would have netted defendant commissions in the sum of \$9681.86; and that plaintiff failed and refused to supply defendant with said oils and greases to fill its said orders or to net defendant any portion of said commissions above mentioned.”

for the reason that the same is irrelevant, immaterial and furnish [489] no defense to matters and facts set up in the complaint and not a proper measure of damages.

III.

That paragraph VI be stricken therefrom for the reason that the damages asked for therein are predicated upon a wrong measure of damages and are irrelevant, immaterial and redundant matter and serves as no defense to the matters and facts set up in the complaint and as admitted by defendant.

IV.

To strike from said third amended answer all of paragraph VII of the second affirmative defense for the reason that the same is irrelevant, immaterial, redundant and furnishes no defense to

the matters and facts set up in the complaint and not such damages as can be recovered in a case of this kind.

COONEY & KELLEY,

WINN & OOGHE,

Attorneys for Plaintiff.

Copy received May 15, 1922.

H. L. FAULKNER,

Attorney for Defendant.

Filed in the District Court, District of Alaska, First Division. May 15, 1922. John H. Dunn, Clerk. By L. E. Spray, Deputy. [490]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,

Defendant.

**Order Denying Motion to Strike from Third
Amended Answer and to Make Same More Spe-
cific and Certain.**

This matter having come on for hearing on the 24th day of June, 1922, upon motion of the plaintiff that the defendant be required to make its third amended answer on file herein more definite and

certain, and that certain portions of the same be stricken; and the plaintiff being represented by Winn & Ooghe and the defendant by H. L. Faulkner, and the Court having heard the argument of counsel for both sides, and being fully advised in the premises,—

IT IS HEREBY ORDERED that said motion be, and the same is hereby denied; and the plaintiff is allowed five days from July 8th, 1922, in which to interpose a demurrer to said third amended answer, and plaintiff is allowed an exception.

Done in open court this July 8th, 1922.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Jul. 8, 1922. John H. Dunn, Clerk. By W. B. King, Deputy.

Entered Court Journal No. R, page 294. [491]

In the District Court for the Territory of Alaska,
Division One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Demurrer to Third Amended Answer.

Comes now the above-named plaintiff, by its attorneys, Winn & Ooghe, and demurs to all that portion of the third amended answer of the defendant herein, as follows, to wit:

I.

To paragraph four of said first affirmative defense set forth in said third amended answer, on the ground and for the reason that said paragraph does not state facts sufficient to constitute a cause of action against the plaintiff herein, or states facts sufficient to constitute an offset or counterclaim against the said plaintiff, or to constitute any defence, to the facts set up in the complaint herein or any offset or counterclaim to the causes of action or either of the causes of action set up in plaintiff's complaint.

II.

For the same reasons above set forth the said plaintiff demurs to the fifth paragraph set up in the first affirmative defence of defendant's third amended answer.

III.

For the same reasons this plaintiff demurs to the sixth paragraph of the first affirmative defence set up in defendant's third amended answer; and for the further reason, that the facts alleged in said paragraph six claims certain damages or profits [492] to recover of and from the said plaintiff and that the same are too remote, speculative and

uncertain to predicate any cause of action against plaintiff or offset or counterclaim to any amount claimed due from defendant to plaintiff by reason of the causes of action set up in the complaint or either of the said causes of action.

IV.

For the same reasons last above mentioned, this plaintiff demurs, separately and collectively, to paragraphs VII and VIII of defendant's first affirmative defense set forth in its third amended answer herein.

V.

This plaintiff also demurs to the entire first affirmative defence set forth in said third amended answer of defendant upon the grounds and for the reason that the same does not state facts sufficient to constitute a cause of action, affirmative defence, counterclaim or offset to the matters and facts set forth in the complaint herein or either of the causes of action set forth therein, nor does not state facts sufficient to entitle the defendant to any relief whatsoever, as against the claim of plaintiff herein.

Comes now the above-named plaintiff, by its attorneys, Winn & Ooghe, and demurs to all of that portion of the second affirmative defence set up in the third amended answer therein, to wit:

I.

To paragraph II thereof on the grounds and for the reason that said paragraph does not state facts sufficient to constitute a cause of action against the plaintiff herein, or state facts sufficient to con-

stitute an offset or counterclaim to the causes of action or either of the causes of action set up in plaintiff's complaint, or does not state facts sufficient to entitle the defendant to any relief whatsoever. [493]

II.

For the reasons last above set forth this plaintiff demurs separately and collectively to paragraphs III, IV, V, VI, of the said second affirmative defence set forth in defendant's third amended answer, and demurs separately to each of said paragraphs and to the whole thereof, and on further grounds in addition to the grounds last above stated, that the profits or damages set forth therein are too remote, speculative and uncertain to be any defence to the matters and facts set forth in the complaint herein, or entitle the defendant to any relief whatsoever.

III.

For the reasons last above set forth this plaintiff demurs to paragraph VII of the said second affirmative defence set forth in the defendant's third amended answer herein; and also demurs to the entire second affirmative defence set forth in said third amended answer of defendant upon the grounds and for the reasons set forth in the above paragraph II of this demurrer.

WINN & OOGHE,

Atty. for Plaintiff. •

Filed in the District Court, District of Alaska, First Division. Jan. 19, 1923. John H. Dunn, Clerk. By —————, Deputy. [494]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Trial (Continued).

Continuation of Trial—2 P. M.

The trial of this case is resumed. Counsel for
defendant at this time files a demurrer to the third
amended answer, which is overruled.

Plaintiff rests.

* * * * *

Whereupon Court adjourns until to-morrow
morning at ten o'clock A. M.

(Signed) THOS. M. REED,
District Judge.

Friday, January 19, 1923.

Journal S, page 38. [495]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG CO., a Corporation,

Defendant.

**Instruction Offered and Tendered the Court by the
Plaintiff.**

* * * * *

1.

I instruct you, Gentlemen of the Jury, that under the pleadings, testimony and evidence in this case, the amount that is claimed to be due from the defendant herein to the plaintiff on its first cause of action of \$3738.17, together with interest thereon at the rate of eight per cent per annum from the tenth day of September, 1918, and the further sum of \$2578.31, together with interest thereon at the rate of eight per cent per annum, from the tenth day of November, 1918, as alleged in the second cause of action, are what is known in law as an account stated; that is, these amounts consist of an account rendered by the defendant in this case to the plaintiff, exhibiting to the plaintiff, according to defendant's books, the amount that was due from defendant to plaintiff, which said

amounts or amount was accepted by the plaintiff to be the amount or amounts due from defendant to plaintiff and was acquiesced in by both plaintiff and defendant and were admitted by both plaintiff and defendant to be the correct amounts due from defendant to plaintiff; and, this being the case, said stated or [496] agreed account could not be opened unless fraud, error or mistake is shown, and there is no evidence in this case to show that either the plaintiff or the defendant have been or were guilty of the practice of fraud in arriving at the amount that was due from defendant to plaintiff, and no error or mistake has been alleged in arriving at this amount or these amounts that are due from defendant to plaintiff, and for this reason the said defendant is now precluded and estopped from denying said account and the amount that is claimed in plaintiff's complaint that is due from defendant to plaintiff, as above stated; and any counterclaim or offset that the defendant may now claim to have to said amount or amounts by reason of the facts set forth in the third amended answer herein, cannot be considered by you, and therefore it is your duty to find herein in favor of the plaintiff and against the defendant for the amounts mentioned herein, with interest thereon at eight per cent per annum from the respective dates stated in the instruction to you.

2 and 3.

If the Court does not give the above instruction, then we request that the Court instruct the jury as follows, to wit:

You are instructed, Gentlemen of the Jury, that if you find, by a fair preponderance of the evidence in this case, that there was an open, current account, or mutual account existing between plaintiff and defendant and that plaintiff and defendant, or some one authorized to represent plaintiff and defendant, went over their respective accounts and agreed that there was a balance due from defendant to plaintiff, of the sum of \$3738.17, and that the plaintiff sold and delivered to the defendant, goods, wares and merchandise consisting of refined and lubricating oils of the [497] reasonable and agreed worth and value of \$2578.31, and that this price for said goods, wares and merchandise and refined or lubricating oils was agreed upon to be the value thereof between plaintiff and defendant, then the amounts sued for, or claimed to be due from defendant to plaintiff by reason of the complaint filed herein, become what is known in law as an account stated and become binding upon plaintiff and defendant herein, and cannot be opened up for the consideration of any counterclaim or offset thereto, which said offset or counterclaim, existed prior to the time that plaintiff and defendant had such adjustment and settlement of said amount that was due from said defendant to plaintiff; and, therefore, it would be your duty to find in favor of the plaintiff and against the defendant for the respective sums of \$3738.17, with interest thereon at the rate of eight per cent per annum from the tenth day of September, 1918, and for the further sum of \$2578.31, together with interest thereon at the rate of eight per cent per annum from the tenth day of Sep-

tember, 1918, providing that you further find that the counterclaims or offsets set up in the third amended answer by the defendant existed prior to the time that the settlement and adjustment of the accounts between the plaintiff and defendant were had in the manner above stated.

* * * * *

WINN & OOGHE and
L. C. KELLY,
Attorneys for Plaintiff. [498]

In the District Court for Alaska, Division Number
One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

Motion for Directed Verdict.

Comes now the above-named plaintiff by its attorneys, Winn & Ooghe and L. C. Kelly, and the evidence all being in and both parties resting, moves the Court for an instructed verdict in favor of plaintiff and against defendant for the amount claimed in its complaint herein, for the reason generally that there is no evidence or testimony in the case to justify the jury in allowing any offset or counterclaim to the

amount claimed by plaintiff in this suit; that the evidence and testimony given by defendant absolutely from a point of law or fact failed to establish any counterclaim, offset, or cause of action to the claim of plaintiff or defense thereto; that there is no relevant or material testimony in the case to support any of the allegations in the answer that is termed a third amended answer herein and as it was amended, after the case was called for trial. This motion is made and based on the files, records, testimony, exceptions and objections, and entire proceedings in this case.

WINN & OOGHE and
L. C. KELLY,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Jan. 24, 1923. John H. Dunn,
Clerk. By —————, Deputy. [499]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA

vs.

C. W. YOUNG COMPANY.

Trial (Continued).

Continuation of Trial—2 P. M.

All jurors being present, the trial of this case is resumed. The several motions heretofore made by

counsel for the plaintiff and argued by counsel are at this time denied by the Court.

(Signed) THOS. M. REED,
District Judge.

Wednesday, January 24, 1923.

Journal S, page 47.

Whereupon Court adjourns until to-morrow morning at ten o'clock A. M. [500]

In the District Court for Alaska, Division Number One, at Juneau.

No. 2013—A.

UNION OIL COMPANY OF CALIFORNIA, a
Corporation,

Plaintiff,

vs.

C. W. YOUNG COMPANY, a Corporation,
Defendant.

**Motion to Make Part of Record, Certain Papers,
Pleadings, Orders.**

Comes now the above-named plaintiff, Union Oil Company of California, a corporation, by its attorneys, Winn & Ooghe, and respectfully moves and requests the Court to make part of the record on the writ of error sued out herein to the U. S. Circuit Court of Appeals, Ninth Circuit, at San Francisco, the following papers, pleadings and orders, all of which are material for the presentation of said cause on said writ of error, to wit:

1. Bill of particulars made by defendant served on plaintiff and filed herein.

2. Answer (original answer).

3. Amended answer.

4. Second amended answer.

5. Motion to strike and make more definite and certain, etc., certain portions of answer which said motion was filed on August 17, 1921.

6. Order made on motion to strike and make more definite and certain, which said order is under date of Oct. 22, 1921.

7. Motion to strike from second amended answer filed March 22, 1922, and order of Court made thereon.

8. Order ruling on motion which said order was filed under date of May 10, 1922.

9. Motion to strike and make more definite and certain, etc., [501] certain portions of the third amended answer, which said motion was filed May 15, 1922.

10. Order denying the last above-mentioned motion, which order was filed and entered under date of July 8, 1922.

11. Demurrer to the third amended complaint filed July 13, 1922.

12. Order overruling the last above-mentioned demurrer filed July 15, 1922.

13. Second demurrer filed to the third amended complaint filed January 19, 1922, and order overruling the same.

14. Instructions numbers 1, 2 and 3 offered and tendered to the Court pertaining to what it took to

constitute an account stated and which are on file with the Clerk of this Court.

15. Motion for a directed verdict in favor of plaintiff filed January 24, 1922, and order denying the same made on the same date.

That all of the above-named orders, motions, demurrers, etc., are necessary and essential to complete the record on the writ of error sued out herein and are omitted from the record offered by defendant to be settled herein on said writ of error as well as omitted from defendant's praecipe.

Dated this 27th day of April, 1923.

WINN & OOGHE,
Attorneys for Plaintiff.

A copy received this 27th day of Apr., 1923.

H. L. FAULKNER,
Per H.

Filed in the District Court, District of Alaska, First Division Apr. 27, 1923. John H. Dunn, Clerk. By L. E. Spray, Deputy. [502]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

Certificate of Clerk of U. S. District Court to Transcript of Record.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby

certify that the foregoing and hereto attached 503 pages of typewritten matter, numbered from one to 502, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per praecipe of the plaintiff in error, on file herein and made a part hereof, in the cause wherein C. W. Young Company, a Corporation, is plaintiff in error and Union Oil Company of California, a corporation, is defendant in error, No. 2013—A, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof, in accordance therewith.

I do further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination, and certificate, amounting to Two Hundred and Thirty and 70/100 Dollars (\$230.70), has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 9th day of May, 1923.

[Seal]

JOHN H. DUNN,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 4032. United States Circuit Court of Appeals for the Ninth Circuit. C. W. Young Company, a Corporation, Plaintiff in Error,

vs. Union Oil Company of California, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One, at Juneau.

Filed May 16, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

C. W. YOUNG COMPANY, a corpora-
tion,

Plaintiff in Error,

VS.

UNION OIL COMPANY OF CALI-
FORNIA, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION
NO. ONE.

BRIEF OF PLAINTIFF IN ERROR

H. L. FAULKNER,
Attorney for Plaintiff in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

C. W. YOUNG COMPANY, a corpora-
tion,

Plaintiff in Error,

VS.

UNION OIL COMPANY OF CALI-
FORNIA, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION
NO. ONE.

STATEMENT OF THE CASE

This is an action brought by the Union Oil Company of California, a corporation, defendant in error, (hereinafter designated as "the Oil Company") against the C. W. Young Company, a corporation plaintiff in error, (hereinafter designated

as "the Young Company") and the complaint alleges two causes of action. In the first cause of action it is alleged that the Oil Company entered into a contract with the Young Company on February 14, 1917, under the terms of which the Young Company agreed to furnish satisfactory storage facilities for the necessary handling of the Oil Company's products, and the Oil Company constituted the Young Company its agent for the handling of its oils and products, etc., in the territory known as Juneau, Alaska, upon certain conditions. A copy of this contract is annexed to the complaint as Exhibit "A," and is found on pages 6, 7, 8 and 9 of the Transcript. It is then alleged in the first cause of action that under the terms of said contract and during the years 1917 and 1918 the Oil Company sold and delivered to the Young Company goods, wares and merchandise amounting to the "agreed and reasonable price of \$5,619.34," consisting of refined oils, lubricating oils, greases, etc. and that the Young Company was entitled to a commission of \$281.93 on the sales of these oils, and that they remitted to the Oil Company only \$1,599.22, leaving a balance due the Oil Company of \$3,738.17.

The second cause of action alleges that on October 5, 1918, the Oil Company sold goods, wares and merchandise to the Young Company of the reasonable worth and value of \$2,578.31, which sum the Young Company has not paid. The complaint demands judgment against the Young Com-

pany for these two sums, namely \$2,578.31 and \$3,738.17.

The answer of the Young Company, the defendant in this action, admits the entering into of the contract mentioned in the complaint, and, upon the trial the Young Company admitted that it had sold oils amounting to approximately the sums demanded in the complaint for which it had not accounted to the Oil Company and then it sets up two affirmative defenses.

The first affirmative defense refers to the contract of February 14, 1917, and alleges that under the terms of this contract the Young Company furnished the necessary dock and storage facilities for the handling of the oils and other products of the Oil Company, and that it procured orders for the sale of oils, etc. in the territory which would have netted it commissions during the life of this contract of \$13,595.95. It then alleges that the Oil Company failed to furnish the oils required, and which the Oil Company had agreed to furnish and that the Oil Company furnished oils, the sale of which netted the Young Company commissions of only \$3,819.09; and that the Young Company had been damaged in the sum of \$9,681.86.

The second affirmative defense alleges that in January, 1915, the Young Company and the Oil Company entered into an oral contract which was somewhat similar in its terms to the contract of 1917, and that the defendant agreed to furnish

storage facilities consisting of a dock, warehouse, etc. for the handling of the Oil Company's products at Juneau, and that the Oil Company agreed to furnish the Young Company with all the oil it could sell in the Territory of Alaska, upon certain commissions. This contract was to remain in full force and effect for three years, unless cancelled by mutual consent or by either party's giving the other thirty days notice in writing; and that the parties acted under the contract until the time of the execution of the written contract of February, 1917, referred to in the complaint and in the first affirmative answer. It is then alleged that the Oil Company failed to comply with the terms of the contract in that it did not furnish the oils for which orders had been procured by the Young Company and that the Young Company had lost sales which would have netted it commissions of \$9,681.86 through the failure of the Oil Company to furnish the required oil to meet the demands in the territory designated. It is further alleged that the storage facilities, dock and warehouse furnished at the request of the Oil Company cost the Young Company \$15,425.91. It is also alleged that at the time the written contract of February 14, 1917, was entered into the differences between the Oil Company and the Young Company were discussed between them, and the damages to the Young Company were brought to the attention of the Oil Company, and the Oil Company promised to make an

adjustment and to pay the Young Company the amount of damages it had sustained.

Upon the trial the Oil Company introduced evidence to show the value of the oils which had not been accounted for by the Young Company, which values were practically admitted by the Young Company and then the Young Company introduced evidence to sustain the allegations of its affirmative defense and tending to prove the orders which it had for oils which orders could not be filled on account of the action of the Oil Company in not furnishing the oil when demanded, and the Young Company introduced evidence to show from whom these orders were received and to show that it had been damaged by loss of commissions in a sum between nine and ten thousand dollars. The terms of the oral contract were proved by the testimony of Mr. McBride, Manager of the Young Company, and by numerous letters and telegrams exchanged between the Oil Company, whose headquarters were in Seattle, Washington, and the Young Company, whose headquarters were at Juneau, Alaska, during the whole period from January, 1915, to October, 1918.

It was admitted on the trial that the storage facilities consisting of the dock, warehouse, etc. which the Young Company agreed to furnish at the beginning of the period covered in the oral contract were furnished by it, and that they were satisfactory to the plaintiff, Oil Company. (Tr. p. 91.)

These facilities were erected and furnished after the contract was entered into. (Tr. p. 94.) It was also admitted upon the trial that the territory designated as "Juneau" in the contract of February 14, 1917, meant Southeastern Alaska, (Tr. p. 75, 127, 128.) and so far as territory is concerned, it was also admitted that under both the contracts of 1915 and 1917, it included all territory in which the Young Company could sell oil from its Juneau stocks. (Tr. p. 128.)

Errors assigned are to the rejection by the Court of certain evidence offered, and the giving of certain instructions by the trial court, and in overruling defendant's motion to set aside the verdict and grant a new trial. These errors are as follows: (Tr. pp. 517 to 522. inc.)

ASSIGNMENTS OF ERROR

I.

The Court erred in rejecting the evidence offered by defendant to prove the cost and expense of furnishing and maintaining the necessary dock, warehouse and storage facilities for storing the lubricating oils, greases, etc. under the contract of 1915.

II.

The Court erred in rejecting the evidence of defendants as to the general business conditions of the trade in the Territory of Alaska, and in the

vicinity of Juneau during the years covered by the contracts mentioned in the pleadings.

III.

The Court erred in giving Instruction No. VIII to the jury, which said instruction is as follows:

“I further instruct you, however, that under the contract as it is pleaded, the plaintiff was not required to keep on hand, at Juneau, Alaska, at all times, a sufficient supply of oils to meet all possible demands. The defendant, under the contract, was appointed the agent of the plaintiff for the sale of its oils and by-products, and the presumption is, under the general terms of the contract plead, that the defendant would notify the plaintiff of all orders or contracts for the sale of oil received by it and that deliveries would be made by plaintiff according to such notification.” (Tr. p. 497.)

IV.

The Court erred in giving Instruction No. IX. to the jury, which said instruction is as follows:

“In considering the contract of 1915, you should take into consideration the testimony of the witnesses, and the letter of the plaintiff Oil Company to the defendant, of the date of March 1, 1915, which is Defendant's Exhibit ‘A’; and from the evidence and such letter, determine the exact nature of the contract entered into between the parties, bearing in mind, however, that if the contract says that the defendant was acting as agent of plaintiff for the sale of plaintiff's oil, it was its duty, as such agent, to notify the plaintiff

of all sales and prospective sales of oils for delivery to customers; and further, unless the contract specifically provided, in terms that the oils and compounds mentioned in the contract, should at all times be kept on hand at Juneau, Alaska, for such sales as defendant might make, the defendant could not complain by reason of shortage in the amount of such oils at Juneau, except as to such oils as were not delivered to defendant after request or notification to plaintiff by defendant of such sales." (Tr. p. 497-8.)

V.

The Court erred in giving Instruction No. XIII. to the jury, which said instruction is as follows:

"I instruct you that the defendant is seeking, in this cause of action, to recover damages for the loss of anticipated profits on sales of oils made by it, and in considering such anticipated profits, you should consider only such contracts or agreements as were reasonably certain of execution, and should not indulge in estimates of profits or speculations or conjectures of witnesses not based upon facts. The purpose of allowing damages in cases of this kind, is to compensate the party injured by the breach of contract for any loss he may have sustained thereby, and such damages must be capable of being estimated with reasonable certainty. Therefore, in this instance, which is for damages for loss of anticipated profits, you should take into consideration only those contracts for sale of oils made by defendant which are certain and specific as to amount and as to

the time of delivery, and which, under the proof, you are reasonably certain would have been consummated had the goods been delivered to defendant by plaintiff, as provided by the contract, but failed because of nondelivery as required thereby. Mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase, without the expression of quantity or value, and opinions as to what sales could or probably would have been made but for the alleged breach of the contract by plaintiff all fall within the category of speculative, uncertain and remote profits and do not, of themselves, show a right of recovery, and defendant cannot recover therefor. You, therefore, should consider only such contracts as you are satisfied from the evidence, are reasonably certain as to the amount and date of the consummation thereof. Mere indefinite promises are matters of speculation and cannot be made the basis of a claim for damages." (Tr. pp. 499, 500.)

VI.

The Court erred in giving plaintiff's requested Instruction No. XIII., contained on page 13 of the instructions submitted by the plaintiff, which said instruction is as follows: (Renumbered No. 29.)

"The jury is instructed that under the terms and conditions of the contract of 1915, the defendant was not warranted in entering into any contracts or orders for the sale of either refined or lubricating oils, the delivery of which was to be made in the future, and defendant cannot recover any sum as damages for loss of profits on such contracts or orders, unless

such contracts or orders were confirmed by the plaintiff after notice thereof by defendant. (Tr. p. 511.)

VII.

The Court erred in overruling defendant's motion to set aside the verdict and grant a new trial herein.

ARGUMENT AND AUTHORITIES

The assignments of error present to this Court for determination the following questions, namely:

I.

Was it error for the trial court to construe the terms of the contract of 1915 to the jury as it did in instructions to the jury set forth in Assignments of Error numbered 3, 4 and 7? (Assignment No. 7 refers to plaintiff's requested instruction No. 13 which was contained in Court's instruction No. 29.)

II.

Was it error to reject the testimony offered regarding the cost to plaintiff in error of the dock and storage facilities?

III.

Did the trial court give the jury the proper rule for computation of damages for loss of anticipated profits as set forth in Assignments of Error number 5?

These questions will be taken up in numerical order.

I.

WAS IT ERROR FOR THE TRIAL COURT TO CONSTRUE THE TERMS OF THE CONTRACT OF 1915 TO THE JURY AS IT DID IN INSTRUCTIONS TO THE JURY SET FORTH IN ASSIGNMENTS OF ERROR NUMBERED 3, 4 AND 7?

The contract of 1915 was an oral contract and its terms and conditions were presented to the jury for its consideration and interpretation by the testimony of Mr. McBride, and the letters and telegrams which passed between the Oil Company, and the Young Company during the period the contract was in force. This contract of 1915 remained in force until the written contract was executed in February, 1917, and the written contract was a continuation of the oral contract, though slightly different in terms. If there arose any doubt in the minds of the jury from the evidence as to the terms of these contracts, they ought to have been permitted to consider the terms according to the construction placed upon the contracts by the parties themselves during the years they were in effect. There was ample evidence to show what this construction was.

It is alleged in the answer of the Young Company (Par. 2, 2d Affir. Def., Tr. p. 15) that the plaintiff and the defendant entered into an oral contract under the terms of which the defendant, Young Company was to act as agent of the plain-

tiff, Oil Company, for the sale of its products, etc. in Alaska, and the Young Company agreed to furnish dock and storage facilities, and the Oil Company agreed to supply the defendant, Young Company, at all times during the life of the contract with *sufficient* oils and greases, etc. to supply *all* the demands of *all* customers the defendant, Young Company could procure within the Territory of Alaska. There is no contract of special agency plead and the allegations of the pleadings indicate that the Young Company was constituted a factor and not a broker. The uncontroverted testimony establishes this fact. Mr. McBride, Manager of the Young Company, who made the contract on its behalf, testified as to the terms of the contract of 1915. (Tr. pp. 79, 80, 90, 94, 95.) This testimony was not controverted.

It is significant that the plaintiff, Oil Company, in its reply denies any contract at all, except the written one of 1917. (Tr. p. 22, Par. 1 and 2, plaintiff's reply.) No testimony was introduced by plaintiff, Oil Company, to show the terms of the contract of 1915, nor to controvert the testimony of the defendant, Young Company as to its terms.

The trial court in the instructions complained of and excepted to, namely 8, 9 and 29 told the jury that,

“The presumption is, under the general terms of the contract plead, that the defendant would notify the plaintiff of all orders or contracts for the sale of oil re-

ceived by it, and that deliveries would be made by plaintiff according to such notification." (Tr. p. 497.)

And, again,

"If the contract provides that the defendant was acting as agent of the plaintiff for the sale of plaintiff's oils, it was its duty as such agent to notify the plaintiff of all sales and prospective sales of oils for delivery to customers; and further, unless the contract specifically provided, in terms, that the oils and compounds mentioned in the contract should at all times be kept on hand at Juneau, Alaska, for such sales as defendant might make, the defendant could not complain by reason of shortage in the amount of such oils at Juneau, except as to such oils as were not delivered to defendant after request or notification to plaintiff by defendant of such sales." (Tr. pp. 497, 498.)

And yet, again, at plaintiff's request, the Court instructed the jury as follows:

"You are instructed that, under the terms and conditions of the contract of 1915, the defendant was not warranted in entering into any contracts or orders for the sale of either refined or lubricating oils, the delivery of which was to be made in the future, and defendant cannot recover any sums as damages for loss of profits on such contracts or orders unless such contracts or orders were confirmed by the plaintiff after notice thereof by defendant." (Tr. p. 511, Instruction N o 29.)

Now, what is the testimony? As above stated, the allegations of the second affirmative answer are sufficiently broad to cover any kind of agency, either that of broker or factor. (See par. 2, 2d affir. def. Tr. p. 15.)

The testimony of Mr. McBride is that the Oil Company promised to

“furnish me with the oil for sale”;
* * * all that I could sell” * * * in South-
eastern Alaska.” (Tr. p. 80.)

The fact that the Young Company was to furnish a dock, warehouse and storage facilities bears out this construction of the contract. (See Oil Company's letter, defendant's Exhibit “A.” Tr. p. 82, also testimony McBride, Tr. p. 79.) Indeed, the bare statement of the very nature of the business itself makes it apparent that what was agreed was that the Oil Company was to establish a station in Juneau for the sale of its oils, greases and other products in Southeastern Alaska. An agency or station where its oils were to be sold in competition with the Standard Oil Company and others. Such a business could not be established nor carried on in the very nature of things if every time a fishing boat or cannery tender came in for oil, the order had to be sent to Seattle, one thousand miles away, and delivery then made by plaintiff, Oil Company, as set forth in Instruction numbered 8; or even the order confirmed in Seattle.

If there was any issue made by the pleadings and testimony as to the nature of the contract of agency, then the true test and proper guide for the jury in determining the nature of the contract in such event was to ascertain what the parties did under it, and it was a question of fact for the jury to decide whether the Young Company was only to take orders for oils, greases, etc. and transmit those orders to the Oil Company at Seattle to be confirmed by it, and then filled from the Oil Company's Seattle stocks, or whether the contract contemplated the establishment of a sub-station with stocks and supplies on hand at Juneau to fill the Southeastern Alaska orders. The jury was precluded by the instructions complained of from determining this question of fact.

We have only to examine the uncontroverted testimony to get from the defendant in error, the Oil Company itself, its construction of the contract, and to look at the dealings and transactions between the parties during the years the contract was in force, as set forth by the evidence. A reference to the evidence clearly shows the nature of the contract, and that it was not such as construed by the Court in the instructions.

In addition to the testimony of Mr. McBride, above referred to, regarding the terms of the contract and the agreement between the parties made at the time the contract was entered into, we have at the very inception of the contract a letter from

the Oil Company to the Young Company, in which such expressions as the following are used by the Oil Company:

"In order that you may keep an accurate record of your stocks on hand" ***

"At the top of your report you will show the amount of oil on hand to begin with." * * *

"At the end of the week you total your orders, the total of which subtracted from stock on hand to begin with, plus your receipts will show what you have left." (Def. Ex. "A." Tr. pp. 87, 88.)

On page 128 of the Transcript, a portion of a letter from the Oil Company was read. The remainder of this letter was excluded on objection of defendant in error. The portion read is as follows:

"In designating the territory as Juneau, we do so with the understanding that you are to receive commissions on all oils sold from Juneau stocks. We could not define the territory more definitely for the reason, as you know, we make certain shipment from Seattle stocks on which you would be entitled to no commission. This agreement, so far as territory is concerned, is no change from the agreement under which you have been acting. Any oil that you are able to sell and deliver from your Juneau stock, commissions will be paid to you."

The Oil Company apparently established the agency and station at Juneau so as to be able to make deliveries from there and to compete with the Standard Oil Company.

On April 2, 1915, the Oil Company wrote to the Young Company as follows:

"In a conversation with Mr. Dan Campbell today of the Astoria & Puget Sound Canning Co., he states he gave the Standard Oil Company his business this year for refined oils at their Alaska cannery for the reason that the Standard was able to make deliveries from Juneau.

"I understand that our mutual friend, Mr. Bell, has the placing of these orders, and I believe if you get after him, Mr. Bell will see to it that you get a good share of this business." * * *. (Def. Ex. B. Tr. p. 137.)

Again, in defendant's Exhibit "C" (Tr. p. 139), the Oil Company wrote regarding a contract with the Chichagoff Mining Company and said:

"They will require from 800 to 1000 gallons per week. The supply is to be taken from your stock at Juneau." * * *

On June 21, 1915, the Oil Company wrote the Young Company, referring to the Chichagoff Mining Company contract:

"If our facilities at Juneau are as good as the Standard Oil Company's, we will get the business. It will take about 2500 gallons of distillate per month, and the boat will call about every six days, taking 600 to 800 gallons at a time." * * *. (Def. Ex. "E." Tr. p. 142.)

On May 22, 1915, the Oil Company wrote:

"We have been obliged to reduce your orders considerably owing to the fact that

we are very short of iron drums." (Def. Ex. "I." Tr. p. 148-9.)

On June 15, 1915, the Oil Company again wrote:

"We are obliged to cut your order for distillate to 70 drums, and your order for gasoline to 30 drums, and eliminate entirely the distillate and gasoline orders in iron barrels." (Def. Ex. "J." Tr. 150-1.)

On June 2, 1915, the Young Company wrote the Oil Company:

"It would certainly be a great detriment to us to have a shortage of oil." Def. Ex. "K." Tr. p. 153.)

On July 6, 1915, the Young Company ordered forty drums of gasoline, one hundred drums distillate, one hundred cases gasoline (Def. Ex. "L," Tr. 155) and the Oil Company replied that *they were obliged to reduce the last order on account of not having sufficient drums*, etc. (Def. Ex. "M," Tr. 156.)

On September 26, 1916, the Oil Company wrote:

"We are endeavoring to keep you permanently supplied with distillate at Juneau and do not anticipate your running short in the future." (Def. Ex. "O" Tr. p. 157.)

What could the Oil Company have meant by stating that they were endeavoring to keep the Young Company "*permanently supplied with distillate*" if the contract was such as explained to the

jury in the instructions complained of, and if the Young Company was acting only as a broker?

So serious was the condition of things due to shortages of oil that in October, 1915, Mr. McBride, manager of the Young Company knowing that his Company had made a large investment in dock, warehouse and facilities to handle the oils under the contract, went personally to Seattle to see the Oil Company about the unfilled orders and the shortages. (Tr. p. 158.)

On July 25, 1916, the Young Company notified the Oil Company of specific orders which they had received that could not be filled because the supply on hand was insufficient. (Def. Ex. "Q," Tr. p. 162.)

On June 7, 1915, the Young Company notified the Oil Company that it had made a thorough campaign of advertising and had begged business from the canneries and "*a shortage would spell disaster.*" (Def. Ex. "T." Tr. p. 169-170.) To the same effect is the letter of July 22, 1916 (Def. Ex. "U." Tr. p. 172.)

On November 20, 1916, the Oil Company wrote to the Chichagoff Mining Company, one of its customers which had been taking oil at Juneau, in which this expression is used:

"We make full acknowledgment of the fact that our stock and service at Juneau has not been satisfactory during the past months, but ample supplies are now available." (Def. Ex. "V" Tr. p. 174.)

On July 21, 1917, after the date of the written contract, the Oil Company wrote the Young Company:

"It is our desire to keep you well supplied this year, and not have any of the shortages that handicapped us last year. We could not enter into any plan to put in a stock at any additional point in Southeastern Alaska." (Def. Ex. "W." Tr. p. 176.)

This letter is significant for the reason that it refers to periods covered by both the oral and written contracts. It refers to past shortages and promises supplies for the future. It also refers to putting in a stock at *additional* points in Southeastern Alaska. If they did not already have a *stock* at one point, why should they use the word "additional."

The telegram of August 10, 1916, from the Young Company to the Oil Company requesting a shipment of oil reads:

"* * * we are turning down business every day." (Def. Ex. "X," Tr. p. 177.)

A telegram from the Oil Company to the Young Company of July 2, 1917, reads:

"No immediate shipment available. Better conserve for local business." (Def. Ex. "Y." p. 178.)

Conserve what, if the contract did not provide for keeping a stock at Juneau?

On June 30, 1917, the Young Company wired the Oil Company as follows:

"We have on hand one hundred eighty-four drums distillate. Does not include Valdez Packing Company purchase. Have order for one hundred fifty drums distillate for outside business, but do not want to let this go unless we are assured of immediate shipment, *as we are again getting back local business due to supply on hand.* Answer immediately. Important." (Def. Ex. "F." Tr. p. 145.)

On June 23, 1917, the Young Company wired the Oil Company as follows:

"Received order forty drums distillate day before yesterday from Valdez Packing Company and yesterday five drums gasoline. We expect to ship the distillate in a day or two unless you advise us to the contrary, but cannot ship the gasoline as we have but three drums on hand now. *Steamer Portland was in day before yesterday and we expected the balance of our refined oil order on board, but none arrived. When can we expect it?*" Def. Ex. "H," Tr. p. 147-8.)

On July 27, 1917, the Oil Company wrote:

"On account of conditions of our stocks at Seattle, we were unable to make shipment at the present time. We note that your supply of gasoline is quite low." * * * (Def. Ex. "Z," Tr. p. 181.)

Another letter from the Oil Company in which it is indicated that they intended to keep a stock on hand at Juneau is the one of March 24, 1915, in which they change an order the Young Company had sent in, and among other changes increased an

amount of ideal gas engine oil shipped. (Def. Ex. A-1, Tr. pp. 182-3.)

On May 2, 1917, the Oil Company wrote the Young Company:

“The steamer Portland left here yesterday with a shipment of oil *for your storage.*” (Plf. Ex. 6, Tr. 449.)

This clearly indicates the nature of the contract of agency and proves conclusively that the contract provided that the Oil Company was to keep the oil on hand at Juneau in the storage facilities provided by the Young Company sufficient to meet the requirements of the trade.

The Oil Company in its pleadings denied the existence of the contract of 1915, and they introduced no correspondence between the two companies during the entire period of over three years covered by the two contracts, save two or three letters and telegrams furnished them by the Young Company in response to a request made at the trial, (Tr. pp. 295 and 447), to bolster up a contention made by them in rebuttal as an after-thought that the oral contract, the very existence of which they had denied in their reply, was violated by the Young Company's not returning empty drums promptly and making remittance each month. But even Mr. Trew, the official of the Oil Company who testified in its behalf, referred to “*our different substations*” (Tr. p. 428) and admitted that at the time the contract was entered into, he made for the

Young Company "*a list of accounts in towns close to Juneau to whom we could extend credit.*"

The following question and answer appear in the testimony of Mr. Trew in rebuttal:

"Q. Mr. Trew, Mr. McBride testified, in substance, that in that conversation Mr. Clagett agreed to furnish him with all the products of the Union Oil Company which he could sell in Southeastern Alaska. Was any such statement as that made by Mr. Clagett?

"A. No; there was not. It was Juneau and the vicinity, and right after that meeting Mr. Clagett asked me to make out a list of the accounts to whom we would extend credit, and I looked up the map at that time, not being familiar with the towns around here, and picked out three or four towns that were close to Juneau and made a list of the accounts in Juneau and these few smaller towns to whom we could extend credit and others that we would want on a strictly c. o. d. basis. I didn't get all the towns in, but it was in the neighborhood of these places." (Tr. pp. 424-5.)

Here Mr. Trew, the official of the Oil Company who testified in its behalf and represented it at the trial, *admits that the Oil Company had agreed to furnish the Young Company with all the products of the Oil Company which the Young Company could sell in Juneau and vicinity, including the towns designated by Mr. Trew and referred to in his answer.*

The Oil Company in its letter of May 8, 1917, says the Young Company is to receive commissions on all oils sold "*from your Juneau stocks*"; and, further, that the territory designated in the written contract is the same as that under the oral contract. (Tr. p. 128.)

Mr. Clagett, who was the Seattle manager of the Union Oil Company, and the man with whom both contracts were made on behalf of the Union Oil Company was not called as a witness, nor was his deposition introduced.

If the subject of remittances had been causing the Oil Company any concern under the oral contract of 1915 and 1916, it is most strange that this subject was not even mentioned in the written contract made in February, 1917. Not a word was inserted in the written contract on this subject. The same is true with reference to empty drums. It is apparent that this was an after-thought on the part of the Oil Company at the trial; and while Mr. Trew says remittances of money and return of empty drums were not prompt, he gives not one specific instance, but contents himself with vaguely saying, "*As I remember it, the account was never up to date from the time, from 1915 until the time he settled, with possibly one or two exceptions.*" (Testimony of Trew. Tr. p. 430.)

As further bearing on the Oil Company's acknowledgment of the nature of the agency, a tele-

gram was introduced dated April 5, 1916, from it to the Young Company asking the Young Company to solicit no more business as the Oil Company could make no shipments owing to the unreasonable advance in freight rates. (Def. Ex. "B-1," Tr. p. 185.)

The Young Company could not have been damaged by this telegram if the trial court's interpretation of the contract, contained in Instructions numbered 8, 9 and 29 was correct; but the Oil Company did not so interpret the contract, for on December 30, 1919, it admitted that if this telegram had been sent, adjustment would be made of the Young Company's account. (Def. Ex. "D-1," Tr. p. 192, and Ex. "E-1," Tr. p. 193.) The telegram was produced at the trial as above mentioned.

The witnesses who were called to testify in corroboration of Mr. McBride regarding their failure to get oil from the Young Company upon application bear out the fact that the oils were supposed to be on hand at Juneau and to be kept there for sale, the same as they were kept at the Standard Oil Company's station, at the dock and warehouse which had been furnished by the Young Company pursuant to the terms of the contract. (See testimony Captain Tibbetts, Tr. p. 355; Earl Hunter, Tr. p. 360-1; James V. Davis, Tr. p. 392-3; Albert Neilson, Tr. p. 408-9-10.)

In the instructions complained of the trial court *assumed certain facts*, and the authorities

hold the rule against the assumption of facts by a trial court is enforced rather strictly.

Blashfield, Instructions to Juries, Vol. 1. Sec. 103, p. 237.

And we respectfully submit that *there is not even a conflict of evidence on the facts assumed in the instructions, and such assumed facts are contrary to all the evidence, as pointed out above.*

It might be contended as counsel urged upon the motion for a new trial that, taking the instructions as a whole, they correctly state the law; but an examination of the whole charge fails to disclose any language which states the true rule for the guidance of the jury. Instruction No. 17 standing alone and not coupled with instructions 8, 9, and 29, might have been sufficient to state the correct rule; or the first clause of instruction No. 9, which is as follows:

“In considering the contract of 1915, you should take in consideration the testimony of the witnesses and the letter of the plaintiff, Oil Company, to the defendant of the date of March 1, 1915, which is defendant’s Exhibit ‘A,’ and from the evidence and such letter determine the exact nature of the contract entered into between the parties.” * * * (Tr. p. 497.)

if the Court had stopped at the word “*parties*”; but taking the instructions as a whole, we find that instructions numbers 8, 9 and 29 are not modified nor rendered harmless by any other instruction.

And in the remainder of Instruction No. 9 the Court told the jury to bear in mind that it was the duty of the Young Company to notify the plaintiff, Oil Company, of all sales and prospective sales of oils for delivery to customers, and that unless the contract provided that all oils and compounds mentioned in the contract should at all times be kept on hand at Juneau, the defendant could not complain by reason of shortage, etc. except as to such oils as were not delivered to defendant after request or notification by defendant of such sales. This latter part of Instruction No. 9 and Instructions Nos. 8 and 29 are no where modified nor rendered harmless.

Instruction No. 32 conflicts with Instructions Nos. 8, 9 and 29. This instruction is as follows:

“It is for you to determine the terms of the oral contract entered into between the plaintiff and defendant, if you find that such contract was entered into in the year 1915, and in determining whether or not such a contract was entered into, you may take into consideration all the testimony introduced upon this point, and you may consider the interpretation placed upon said contract by the plaintiff and defendant, and the acts of the plaintiff and defendant in their relations to each other during the said period, and you may also take into consideration all the correspondence between the plaintiff and defendant bearing upon this point.” (Tr. p. 512.)

And Instruction No. 32 would have presented the question of fact involved, for the determination of

the jury; but Instruction No. 32 is practically the same as the first clause of Instruction No. 9, above quoted, so that we may consider Instruction No. 32 as also modified by the latter part of Instruction No. 9, commencing with the words "*bearing in mind, however.*"

It is fundamental that erroneous instructions are not cured by others given contradicting them, unless of course the Court somewhere in the charge had, after giving the erroneous instruction, given the correct instruction and admonished the jury to disregard the erroneous instruction and be guided by the correct one. The cases so holding are numerous.

Chicago City R. Co. v. Wilcox, 27 NE.
899.

Armour & Co. v. Russell, 144 Fed.
614.

State v. Erie Ry. Co. 87 Atl. 141.

St. Louis I. M. & S. R. Co. v. Woods,
131 SW. 869.

Standard L. & Acc. Ins. Co. v. Sale,
121 Fed. 664.

Sutton v. Ford, L. R. A. 1918 D, 561.

Nutt v. Davidson, 131 Pac. 390.

In the case of *Buchanan v. Caine*, 106 NE, 885, the trial court in dealing with the question of agency, had defined the authority of a special agent as a matter of law, and then the Court in the instructions said to the jury:

"It therefore follows in this case that if you should find that the defendant, and

John G. Ingalls entered into the contract at Indianapolis as claimed by the defendant, before you can charge the plaintiff in any way with such agreement, you must find that John G. Ingalls had authority from the plaintiff to make such contract, or if he did not in fact have such authority then that the plaintiff subsequently ratified the action of said Ingalls in entering into such new contract, if you find that the same was entered into."

The Appellate Court of Indiana in reversing the judgment said:

"The character of agency of Ingalls, whether special or general was a question of fact to be determined by the jury from all the evidence in the case, and not one to be assumed by the Court."

And, in this case the character of agency plead, whether that of a broker or factor, and the nature of the contract between the parties was a question of fact for the jury; and we submit that the undisputed evidence establishes the fact that the Young Company was constituted a factor and that the Oil Company agreed to keep the Young Company supplied at its dock and warehouse in Juneau with sufficient stock of its oils, greases, etc. on hand in storage to meet the ordinary requirements of the demand in the territory designated. The Oil Company does not dispute this, either in the pleadings or evidence, but confines itself solely to an attempt to controvert the testimony of the Young Company as to the *amount* of damages sustained by it through

the breach of the contract on the part of the Oil Company.

II.

WAS IT ERROR TO REJECT THE TESTIMONY OF PLAINTIFF IN ERROR, THE YOUNG COMPANY, REGARDING THE COST TO IT OF THE DOCK AND STORAGE FACILITIES, ETC.?

The undisputed testimony shows that the oral contract of 1915 provided that the Young Company on its part should furnish a dock and storage facilities, etc. for the handling of the oils. (Tr. p. 79.) The defendant in error, the Oil Company, admitted that these facilities were furnished by the Young Company and that they were satisfactory to the Oil Company (Tr. p. 91.) The following question was asked Mr. McBride, witness for the Young Company:

“Q. Now what was the cost of the dock and the tanks, and the storage facilities and warehouse which you furnished for handling these oils pursuant to the contract entered into with Mr. Clagett?”
(Tr. bottom page 91 and top page 92.)

An objection was made to this question (Tr. p. 92) and it was sustained and an exception taken. (Tr. p. 93.)

While it is true that the plaintiff in error, the Young Company prayed for only \$9,681.86 damages, which was the total amount of commissions

it alleged it had lost by reason of the Oil Company's breach of the contract, it also alleged that under the terms of the contract it had expended \$15,425.91 in furnishing and maintaining the facilities, etc. (Par. 4, 2d affir. defense, Tr. p. 16.)

While we do not ask for damages for both loss of anticipated commissions and expenses, the latter should be taken into consideration in estimating the plaintiff in error's loss, so long as the amount found did not exceed \$9,681.86. Both the lost commissions and the expenses are alleged; and both may be recovered; or at least if they are not both prayed for, but are both alleged, evidence should be permitted to prove both for the purpose of fixing the amount of damages incurred so long as the jury is instructed that this amount cannot exceed the amount asked for, namely \$9,681.86.

Taylor Mfg. Co. v. Hatcher & Co. 3
L. R. A. 587, (U. S. Circuit
Court So. Dist. Ga.)

Wells v. National Life Assn. 99 Fed.
222.

United States v. Beban, 110 U. S. 338.

In the case of *Wells v. National Life Association*, *supra*, the Circuit Court of Appeals for the 5th Circuit says, quoting from the case of *U. S. v. Beban*, 110 U. S. 338:

"Adopting substantially the language of the very learned judge who delivered the opinion, without quoting with literal accuracy, we observe that he therein says: 'When a party injured by the stoppage of

a contract elects to go for damages for the breach thereof, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.' 'Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought to be made whole for his losses and expenditures, at least. * * If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged, at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services.) * * At least, it does not lie in the mouth of the party in fault to say this unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract. * * The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth by way of petition a plain statement of the facts, without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation,

and afford him such relief as he may show himself substantially entitled to, if within the fair scope of the claim as exhibited by the facts set forth in the petition.' ” (99 Fed. 228.)

“If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired to show the whole transaction, which is the foundation of the claim and expectation of profit, so far as any detail offered has a tendency to support such claim.” *Sutherland, Damages* p. 113, Cited in 3 L. R. A. 592.

III.

DID THE TRIAL COURT GIVE THE JURY THE PROPER RULE FOR COMPUTATION OF DAMAGES FOR LOSS OF ANTICIPATED PROFITS, IN INSTRUCTIONS NUMBERS 13 AND 24, ASSIGNMENTS OF ERROR NUMBERS 5 AND 6?

In Instruction No. 13 (commencing in the middle of Tr. page 500) The Court said:

“Mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase, without the expression of quantity or value; and opinions as to what sales could or probably would have been made but for the alleged breach of the contract by plaintiff, all fall within the category of speculative, uncertain, and remote profits and do not, of themselves, show a right of recovery, and defendant cannot recover therefor. You, therefore,

should consider only such contracts as you are satisfied from the evidence are reasonably certain as to the amount and date of the consummation thereof. Mere indefinite promises are matters of speculation and cannot be made the basis of a claim for damages."

This instruction was not warranted by the evidence. The evidence on the part of plaintiff in error was clear and explicit as to orders which could not be filled, including the amounts of such orders and the times they were received, and plaintiff in error did not found its claim on "*mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase.*" The testimony of Mr. McBride, manager of the Young Company, who was in charge of its business and who took these orders, was positive and he said he had received the orders and that he could not fill them because he could not get the oil from the Union Oil Company. (Testimony, J. C. McBride, Tr. pp. 98-108 inc. and Tr. pp. 130-135.) He did not speculate as to the amount of business he might have done if the oil had been on hand, nor the amount he expected to do and *he did not state that any of the orders were indefinite or vague.*

It is true that there may be in the testimony a conflict between Mr. McBride and some of the Oil Company's witnesses; but there is nothing indefinite about it and no "*mere expectations, doubtful offers or vague or indefinite assurances of intentions to purchase.*" The only question for the

jury to decide about these orders was whether they were or were not given to the Young Company as alleged and as testified to by Mr. McBride. If the jury believed Mr. McBride and the witnesses for the Young Company who corroborated him regarding these orders, there was no room for speculation regarding the amount of the orders, nor the time when given. If, on the other hand, the jury believed the witnesses for the Oil Company who contradicted Mr. McBride, where they did contradict him, there was still no room for speculation. The portion of Instruction No. 13, quoted above, should not have been given.

To the same effect was Instruction No. 24, which is as follows:

“I instruct you that anticipated profits, to be considered as an item of damage, must be shown with some degree of certainty; and you, as a jury, must be able to ascertain their amount without resorting to speculation or conjecture, and that estimates, speculation or conjectures of witnesses not founded upon actual facts or which are based solely on testimony that is entirely composed of speculations or conjectures that the party claiming damages believed that he would obtain a profit thereon, are insufficient. Therefore, if the jury cannot from the testimony, with reasonable certainty, ascertain the amount of defendant's damages, without resorting to speculation or conjecture, your verdict should be for the plaintiff.” (Tr. p. 509.)

This instruction should not have been given and is not applicable under the testimony. The law applicable to this case was laid down in instructions Nos. 16 and 17, which are as follows:

“You are instructed that the theory of the law is to award compensation for gains prevented and for losses sustained when a contract is broken, and a person breaking a contract is liable in damages for the direct, natural and proximate results of his act. The party damaged is not precluded from recovering anticipated profits merely because they are such, as loss of anticipated profits is a damage that should be compensated for just as much as the destruction of property.” (Tr. pp. 503-4.)

“If the business, which the defendant, the C. W. Young Company was deprived of, if you find from the evidence that the defendant was deprived of certain business, by reason of the failure of the plaintiff, the Union Oil Company to furnish sufficient oils to meet the ordinary requirements of the trade at Juneau, was contemplated or reasonably could have been contemplated by the parties at the time of making the contract, and if it is reasonably certain that a gain or benefit would have been derived, and if it is reasonably certain that a loss was suffered by the defendant, by reason of the failure of the plaintiff to deliver such oils at Juneau as contemplated by the contract, then damages may be recovered by the defendant against the plaintiff for the amount of such loss. Uncertainty as to the amount of damages does not prevent recovery, if it is reasonably certain that a gain or bene-

fit to defendant has been prevented by the breach of the contract on the part of the plaintiff, then the defendant, the C. W. Young Company, is entitled to damages, for the amount of that gain or benefit, and it is for you to fix the amount of such damage, if proved with reasonable certainty." (Tr. p. 504.)

These instructions are sustained by the authorities.

Blagen v. Thompson (Or) 18 L. R. A. 315.

Hoskins v. Scott (Or) 96 Pac. 1112.

Bredemier v. Pac. Supply Co. (Or) 131 Pac. 312.

Fields v. W. U. Tel. Co. (Or) 137 Pac. 200.

Griffin v. Colver, 16 NY. 489; 69 Am. Dec. 718.

Hitchhorn v. Bradley, 117 Ia. 130; 90 NW. 592.

Wakeman v. Wheeler & W. Mfg. Co. 101 NY. 205.

Wells v. Natl. Life Assn. 53 L. R. A. 34, 39 CCA. 476, 99 Fed. 222.

Emerson v. Pac. Coast & N. Packing Co. 96 Minn. 1, 1 L. R. A. (NS) 445; 104 NW. 573.

Schumaker v. Heinemann, 99 Wis. 251, 74 NW 785.

Rice v. Caudle, 71 Ga. 605.

Cranmer v. Kohn, 7 S. D. 247, 64 NW. 125.

Goldman v. Wolff, 6 Mo. App. 490.

Instruction No. 24, therefore, and the portion of Instruction No. 13, complained of, conflict with

Instructions Nos. 16 and 17, and injected an element into the case, and presented a matter to the jury which was not justified by either the pleadings or evidence; and instructions Nos. 13 and 24 were not modified by the Court, nor was the jury instructed to disregard them; and they therefore constituted error.

Chicago City R. Co. v. Wilcox, 27 NE. 899.

Armour & Co. v. Russell, 144 Fed. 614.

State v. Erie Ry. Co. 87 Atl. 141.

St. Louis I. M. & S. R. Co. v. Woods, 131 SW. 869.

Standard L. & Acc. Ins. Co. v. Sale, 121 Fed. 664.

Sutton v. Ford, L. R. A. 1918 D, 561.

Nutt v. Davidson, 131 Pac. 390.

For the foregoing reasons the plaintiff in error respectfully submits that the judgment should be reversed, and the case remanded for a new trial.

August —, 1923 .

Respectfully submitted,

H. L. FAULKNER,

Attorney for Plaintiff in Error.

No. 4032.

IN THE³

United States Circuit Court of Appeals
For the Ninth Circuit

C. W. YOUNG COMPANY, a corpo-
ration,

Plaintiff in Error,

VS.

UNION OIL COMPANY OF CALI-
FORNIA, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION
NO. ONE.

BRIEF OF DEFENDANT IN ERROR

COONEY & KELLEY, AND
JOHN R. WINN,

Attorneys for Defendant in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

C. W. YOUNG COMPANY, a corpo-
ration,

Plaintiff in Error,

VS.

UNION OIL COMPANY OF CALI-
FORNIA, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE TER-
RITORY OF ALASKA, DIVISION
NUMBER ONE, AT JUNEAU

STATEMENT OF THE CASE

The Defendant in Error not being fully satisfied with the statement of the case as made by the Plaintiff in Error, and still relying upon its Motion to Dismiss, which has been heretofore filed, respectfully submits the following statement, and in so doing will follow

the Plaintiff in Error in referring to the Union Oil Company of California as the "Oil Company," and the C. W. Young Company as the "Young Company."

It is admitted that both parties are corporations and that said parties entered into the contract of 1917 and which is attached to and made a part of the Complaint as Exhibit A, and which was introduced in evidence by Defendant in Error. (Tr. pp. 61, 62, 63, 64.) It is admitted that by this contract the Oil Company appointed the Young Company as its agent at Juneau, Alaska, for the sale of its refined and lubricating oils and other by-products, upon a certain commission basis as therein set forth, and that said parties acted under said contract up to and including the 31st day of August, 1918, at which time it was canceled by mutual consent.

The Oil Company, in its first cause of action in its Complaint, alleges that it sold to the Young Company, under the terms and conditions of said contract of 1917, goods, wares and merchandise in the agreed sum of \$5,619.34, and that said Young Company was entitled to commissions on the sale of said products in the sum of \$281.95, and that the Young Company had remitted to the Oil Company the sum of \$1,599.22 from the sale of said products, leaving a balance due to said Oil Company from said Young Company the sum of \$3,738.17.

In the second cause of action of the Complaint, the Oil Company alleges that it sold to said Young

Company in one sale and *not under the terms and conditions of said contract of agency*, goods, wares and merchandise of the agreed value of \$2,578.31.

The Oil Company, after alleging these sums are due and owing and unpaid, prays for judgment against the Young Company in the sum of \$6,316.48 with interest.

The Young Company, in its third Amended Answer, has attempted to deny the allegations of the Complaint as to the amount due, but its denial is not good and were it not for the affirmative defenses, the Oil Company would have been entitled to judgment on the Pleadings for the amount prayed for, less possibly one dollar. The Young Company admits receiving the amount of goods as set forth in the Complaint and alleges that it does not owe the Oil Company for the same. It does not allege payment nor give any reasons for non-payment.

The Young Company sets up as affirmative defenses that the Oil Company entered into an oral contract with the Young Company in January, 1915, which was similar in terms to the contract of 1917, Exhibit A attached to Complaint, which oral contract was to remain in force for three years, or until mutually canceled and that it was mutually canceled by the contract of 1917; that the Young Company fulfilled all of the terms and conditions of both of said contracts on its part to be performed but that the Oil Company failed to deliver and keep the Young Com-

pany supplied with oil; that the Young Company received orders and entered into contracts with customers which it could not fill, which would have made it commissions under said contracts the sum of \$9,681.86.

The Young Company further alleges that the dock, warehouse and storage facilities provided by it in fulfillment of said contracts cost \$15,425.91, but makes no claim for damages by reason thereof and prays for judgment against the Oil Company for \$9,681.86 damages for lost commissions.

The Oil Company filed its motion to require the Young Company to set forth in a Bill of Particulars the names of customers with whom the Young Company had orders or contracts which it could not fill. This was granted and the Bill of Particulars is set forth in the Transcript on pages 538, 539, 540, 541.

This Bill of Particulars contains a statement of the gross requirements of the several customers with whom the Young Company claims it had orders or contracts for the several years 1915, 1916 and 1917, and with the exception of the Pillar Bay Packing Company, the Tenakee Fisheries and the Valdez Packing Company, Mr. McBride testified that the contracts were for future deliveries covering a period of one, two or three years, and that the deliveries on such contracts were not to be made in one delivery but were to be made in various deliveries throughout the period of the contract. (See Tr. pp.

219, 220, 222, 224, 228, 230, 233, 234, 238, 243, 247, 254, 255, 256, 257, 258, 259, 260, 261, 262, 265, 272, 273, 276, 284, 285, 288). Mr. McBride further testified that he notified the Oil Company of these orders and contracts. (Tr. pp. 144, 145, 146, 147, 158, 162.)

In its reply the Oil Company denied generally and specifically all the material allegations of the Answer and alleged that upon the termination of the contract of 1917, Exhibit A attached to Complaint, that the Oil Company and the Young Company checked over the account between them and agreed that the sums prayed for in the Complaint were due from said Young Company to said Oil Company and that said Young Company promised and agreed to pay same.

The Young Company introduced in evidence certain letters sent by the Oil Company to the Young Company for the purpose of showing the contract of 1915. These letters are particularly that of March 1, 1915, Defendant's Exhibit A (Tr. pp. 82 to 90), and certain other exhibits, to which we will call the Court's attention in the course of argument. The contents of these letters are not disputed.

Upon the issues joined in the pleadings as above outlined, the case was tried by the Court with a jury, and the jury, by its verdict, found for the Oil Company on the first cause of action in the sum of \$3,501.67 with interest, and on the second cause of action in the sum of \$2,578.31 with interest. (Tr. p. 27.) The jury allowed the Young Company on its claim for lost

profits the sum of \$236.50, which was deducted from the amount prayed for in the first cause of action.

ARGUMENT AND AUTHORITIES

Counsel for Plaintiff in Error has spent much time in his Brief in an effort to prove that the relation of principal and agent existed between the parties, and that, specifically, that relationship was that of principal and factor. It has always been admitted by the Defendant in Error that the Young Company was the duly appointed agent of the Oil Company for the transaction of its business at Juneau, Alaska. While it is not disclosed by the Transcript, yet on several occasions the Trial Judge, during the trial announced that he was trying the case upon the theory that the relationship of principal and factor existed between the parties. We fail to see why the Plaintiff in Error is seeking to prove such relationship or has grounds to complain of the Trial Judge's theory of the case.

Counsel for Plaintiff in Error has also spent much time in his Brief to prove that, under the contracts, goods were to be delivered to the Young Company, and that it was expected that the Young Company was to keep a stock of goods on hand. Defendant in Error introduced in evidence a summary of the stock reports, which shows that the Young Company had in stock refined oil products at all times from December, 1915, to January 1, 1918. (Tr. pp. 435, 436, 437.) This testimony is not disputed and the stock reports were compiled from reports, orders and sales for-

warded to the Oil Company by the Young Company. We, therefore, feel that Plaintiff in Error has no grounds for complaint.

Counsel for Plaintiff in Error has spent much time in his Brief quoting evidence from which it is claimed that it might have been found that the Oil Company did not fill the orders for refined and lubricating oils placed with it by the Young Company, and that the Oil Company thereby breached its contract. All of this evidence was before the jury and considered by it in making up its verdict and its finding is final and we, therefore, do not deem it necessary to discuss this evidence because same has no bearing upon whether the instructions complained of were or were not properly given.

One other reason why we do not deem it necessary to discuss the evidence of orders for refined and lubricating oils placed with the Oil Company by the Young Company, is because Mr. McBride, president of the Young Company, in his testimony on page 199 of the Transcript, was asked by counsel for Plaintiff in Error and testified as follows:

“Q. Couldn’t you tell from the records that you have what orders were filled and what orders were not filled?

A. No, sir.

THE COURT. You could not?

THE WITNESS. No, I couldn’t.”

And again on page 201 of the Transcript, Mr. Mc-

Bride was asked by counsel for Plaintiff in Error and testified as follows:

“Q. Now regarding this telegram of March 25, 1916, did you receive that shipment?

A. I couldn't say. I can't identify any particular shipment.”

If the Young Company could not identify any particular shipment and could not tell whether its orders had been filled, what is the force of this evidence, except that the Young Company contracted to order such goods that it required to supply its trade and that it was its custom and its duty so to do.

— 1 —

This brings us to the consideration of the first Assignment of Error—the first of three Assignments of Error presented to this Court in Plaintiff in Error's Argument and Authorities.

The Plaintiff in Error complains of Instructions VIII, IX and XXIX, which were given to the jury by the Trial Court. These instructions are very similar in form and meaning. Their meaning is clear and concise and is not subject to a wrong interpretation by the jury, the gist being that it was the duty of the Young Company to notify the Oil Company of all sales and orders or contracts for future deliveries, and unless the contract specifically stated that there was to be kept on hand in stock at Juneau at all times a sufficient amount of commodities for such sales as

defendant might make, and the Young Company failed to notify the Oil Company of such sales and orders or contracts for future deliveries and notify the Oil Company of the future requirements of the trade, it could not complain of a shortage. That it was the duty of the Oil Company to deliver to the Young Company such commodities as it might order to meet the sales and orders or contracts for future delivery, of which it was notified, and if the failure on the part of the Oil Company so to do resulted in damage to the Young Company, a recovery can be had. These instructions stated the law correctly and are within reason and justice.

Let us consider some of the evidence which was before the Court and jury which is pertinent to the instructions complained of.

Plaintiff in Error introduced in evidence a letter written by the Oil Company to it under date of March 1, 1915, which is Defendant's Exhibit A. (Tr. pp. 82 to 90.) We quote such parts of this letter which are pertinent:

"The oils will be consigned to our account at Juneau and all transactions will be handled in our name." (Tr. p. 82.)

Also:

"This report is to be mailed us each week together with your orders, etc." (Tr. p. 87.)

And:

"We are attaching a sample showing how this report is to be made out. Same should be sent to

us each week. At the top of the report you will show the amount of oil on hand to begin with; on the next several lines you will show stock that is received from Seattle; below that you will show sales, itemizing same, using a line (or more if necessary) for each order; at the end of the week you will total your orders, the total of which subtracted from stock on hand to begin with, plus your receipts, will show what you have left." (Tr. p. 88.)

And again:

"We would not authorize you to quote on cannery business for shipment direct from Seattle. There is a certain amount of this trade that will always purchase their oils direct from us at Seattle or the Standard Oil Company, and we do not want you to quote to these concerns a delivery price. The only opportunity you will have of selling the canneries is for what surplus they might require and which they might go to Juneau for." (Tr. p. 89.)

On March 24, 1915, just twenty-four days after the letter of March 1, 1915, Defendant's Exhibit A, was written, the Oil Company wrote a letter to the Young Company in which it states:

"However, if you have business in mind that we do not know of, please advise and we will send what you wish with your next order." Defendant's Exhibit A-1 (Tr. p. 183.)

Mr. McBride testified that most of his orders for oil were sent to the Oil Company by cable. (Tr. pp. 144, 154.)

Defendant's Exhibit A-1 (Tr. p. 183), Defendant's Exhibit I (Tr. p. 149), Defendant's Exhibit J (Tr. p. 151), Defendant's Exhibit R (Tr. p. 164), Defendant's Exhibit S (Tr. p. 168), Defendant's Exhibit Z (Tr. p. 181), all refer to either a request made by the Oil Company to the Young Company that it notify the Oil Company of its orders or contracts for future deliveries and what its requirements will be, or refer to orders or contracts which the Young Company either has received for future deliveries or expected to close.

From the above reference and all through the testimony, it will be seen that it was anticipated that the Young Company would notify the Oil Company of all orders and contracts for future delivery and that the Young Company would advise the Oil Company what the requirements of the trade would be. That was the practice of the parties and that was one of the provisions of the contract as contained in the letters and testimony above quoted and referred to.

Aside from the provisions of the contract as contained in the letters and testimony, it is the legal duty of an agent to notify his principal of every particular phase of the agency so that the principal will be informed at all times concerning all conditions of the agency and may act to properly protect himself.

"Loyalty to his principal's interest also requires that an agent shall make known to his principal every material fact concerning the subject

matter of his agency that comes to his knowledge or is in his memory in the course of his agency."

31 Cyc. 1450;

Mechem on Agency, Par. 2532;

21 R. C. L. 828;

2 C. J. 714;

Cases Cited.

These alleged contracts for future deliveries were either contracts between the several customers and the C. W. Young Company or between the several customers and the Union Oil Company. If these contracts were between the several customers and the C. W. Young Company, the agent violated instructions. The positive instructions given to the Young Company in Defendant's Exhibit A, page 82 of the Transcript, being the letter of March 1, 1915, are

"The oils will be consigned to our account at Juneau, and all transactions will be handled in our name."

Also Mr. Trew testified, Transcript page 428, that

"Mr. Clagett explained that we wanted to be identified with our customers in Alaska and wanted to do our own invoicing.

Q. Did he explain why?

A. Because we wanted to be identified with our customers; also that we would get our payments promptly."

An agent can not contract independently in connection with the subject of the agency and to do so is a violation of good faith and is an act of disloyalty, which would result in the forfeiture of all compensation and the agent would be liable for any damages to the principal resulting therefrom.

"If a broker is guilty of fraud in the execution of his agency, *or is not faithful to his trust, his right to compensation is lost.*"

Chain vs. Katze, 217 Pac. (Cal.) 578.

Cohn vs. Chain, 217 Pac. (Cal.) 579.

We assume, therefore, that by these contracts the Young Company attempted to bind the Oil Company and attempted to make these contracts between the several customers and the Oil Company. If these contracts were made as contracts between the several customers and the Oil Company, how could the Oil Company be expected to fill same unless it was notified of their existence? It would be unreasonable to say that the Young Company could make these agreements secretly and claim damages because the Oil Company did not provide commodities with which to fill same. It would also be unreasonable to say that the Oil Company was required under its contract to furnish commodities at the inception of the contract to fill orders or contracts made by the Young Company with prospective customers which would not be consummated for a period of one, two or three years in advance. If the Young Company could not estimate the time when commodities provided for in the contracts or orders would be called for, how could it be expected that the Oil Company could estimate the time when demand would be made for the fulfillment?

The Oil Company wrote to the Young Company, under date of March 1, 1915, Defendant's Exhibit A (Tr. p. 89):

“The only opportunity you will have of selling the canneries is for what surplus they might require and which they might go to Juneau for.” And under date of March 24, 1915, Defendant’s Exhibit A-1 (Tr. p. 183) :

“However, if you have business in mind that we do not know of, please advise and we will send you what you wish with your next order.”

From this evidence and from the manner in which orders were sent by the Young Company to the Oil Company from time to time, no fair-minded man could say that it was anticipated by the Oil Company that the Young Company would make contracts for the delivery of products covering periods of one, two and three years in advance, and that the profits to be made from such business was within the contemplation of the parties at the time of the execution of the contracts, or either of them, between the Oil Company and the Young Company.

We hold that the law applicable to Vendor and Vendee on the proposition of lost profits, is applicable to the case at bar, namely,—That no recovery can be had for lost profits upon particular contracts for failure to deliver, unless the Vendor is notified or has knowledge of existing valid and binding contracts, which are reasonably certain in their character and reasonably certain of consummation.

“We do not accept Plaintiff in Error’s theory that a manufacturer who takes an order from a wholesaler in the ordinary course of business with-

out any notice except that implied from receiving the order, namely,—that the wholesaler expects to use the goods as a part of his stock in trade to offer to his customers—is liable for the profits which the wholesaler might have made in his business if the manufacturer had not failed in his obligation respecting time and quality. An inquiry into such possible profits involves matters within the exclusive control of the wholesaler, subsequent to the original contract, such as the fixing of prices and terms of credits on re-sale, and also involves collateral matters respecting the solvency of the wholesaler's customers and their true reasons for canceling orders. Both are good grounds for refusing to go into the inquiry in the absence of evidence which establishes the manufacturer's express or implied consent to put himself in the wholesaler's hands. 2 Sutherland on Damages, 2d Ed. Par. 662 to 666, 672."

Halloway vs. White Dunham Shoe Co.,
80 C. C. A. 568, 151 Fed. 216.

In the case of *Guetzkow Brothers Company vs. Andrews & Company*, 92 Wis. 214, 52 L. R. A. 209, it is said:

"Hence it is held that in order to make applicable the special rule of damages—that is, loss of profits—it must be shown that the special circumstances, by reason of which the party invokes such application, were brought clearly home to the knowledge of both parties at the time the contract was made, and it is only applicable in so far as such circumstances were so brought home."

"All rules for the assessment of damages for breach of contracts are supposed to be founded on principles of natural justice, the intention being to keep strictly within such principles. It is on

that ground that the general rule established for the assessment of damages for the breaching of an executory contract to sell and deliver property, * * * *, in order to work out natural justice of special circumstances, must necessarily be broadened out to fit such circumstances, but only when such circumstances are shown to have been brought home to the knowledge of both parties in the making of the contract."

In the case of *Toplitz vs. King Bridge Co.*, 46 N. Y. Supp. 418, the Court stated:

"Nor did the defendant attempt to show that the Vendor made the sale with the knowledge that the goods were to be used by the Vendee under a particular contract which contained a penalty for delay. It is only where the parties have made the contract in contemplation of such special circumstances that special damages therefor can be recovered."

"The rule undoubtedly is as between Vendor and Vendee or Shipper and Carrier, that where the article is destined for a special purpose, that fact shall be communicated to the Vendor or Carrier, if it is to be made the foundation of special damages against them and if it is of a character likely to affect the action of the Vendor or Carrier."

Railway Company vs. Cobb Christie Co.,
64 Ill. 128, 141.

It can hardly be said that the knowledge of existing contracts with the several customers would not have materially affected the conduct of the Oil Company.

In the case of the *Central Trust Co. vs. Clark*, 34 C. C. A. 354, 92 Fed. 293, 297, the Court states:

"In the absence of proof aliunde of knowledge by the defaulting party at the time the contract is made of special circumstances which make other damages the natural and probable effect of breach, such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things, such as would reasonably be anticipated by the parties to such contracts in the great multitude of such cases, and such damages only may be recovered. *Drug Co. vs. Byrd*, 92 Fed. 290; *Railroad Co. vs. Bucki*, 16 C. C. A. 42, 46, 68 Fed. 864, 868 and 30 U. S. App. 454, 460; *Hadley vs. Bazendale*, 9 Exch. 341, 354, 356; *Primrose vs. Telegraph Co.*, 154 U. S. 1, 29, 14 Sup. Ct. 1098; *The Ceres*, 19 C. C. A. 243, 72 Fed. 936, 943; *Boyd vs. Brown*, 17 Pick. 453, 461; *Ingledew vs. Railroad*, 7 Gray, 86, 91; *Railway Co. vs. Mudford* (Ark.), 3 S. W. 814, 816; *Kempner vs. Cohn*, 47 Ark. 519, 527, 1 S. W. 869."

"It is on this principle that an injured party is allowed to charge the other with loss on collateral contracts, *on proving notice, in the absence of such notice, would not be considered within the contemplation of the parties.*"

Blagen vs. Thompson, 31 Pac. (Ore.), 647, 650, 651.

In the note accompanying the case of *Guetschow Brothers Company vs. A. H. Andrews Company*, 52 L. R. A. 209, 215, it is said:

"This purchaser of goods is not entitled to damages against a Vendor for breach of contract, for the loss of profit on a sub-contract, which he made for the sale of the goods, where the sub-contract was not known to the seller at the time of the sale, though it was known that he had pur-

chased the goods for the purpose of re-sale."

Thol vs. Henderson, L. R. 8 Q. B. Div. 457, 46 L. T. N. S. 483;

Rahm vs. Dig, 121 Ind. 283, 23 N. E. 141;

Penn vs. Smith, 104 Ala. 445, 18 So. 38.

There are many cases sustaining damages where a specific finding was made that the Vendor had knowledge of existing contracts. There is testimony in the case at bar from which it is contended that the jury might have found that the Oil Company had knowledge of existing contracts for future deliveries, but in the absence of special findings we do not know what was in the jurors' minds.

Mr. McBride testified in response to questions asked by counsel for Plaintiff in Error, as follows:

"Q. I think I asked you the other day, Saturday, but I want to make sure, did you notify the Union Oil Company about these orders which you had and couldn't fill?

A. Yes, sir."

Why did counsel for Plaintiff in Error ask the president of the Young Company if he notified the Oil Company of these contracts for future deliveries, and why did Mr. McBride testify that he did notify the Oil Company, and if he did notify the Oil Company, why did he do so? Because both counsel for Plaintiff in Error and Mr. McBride knew that the C. W. Young Company was bound by contract, by law and by fair dealing to notify the Union Oil Company of all of its sales and orders or contracts for future deliveries.

These instructions, therefore, are squarely within the evidence and correctly state the law, and if the Trial Court had refused or neglected to give such instructions, it would have been reversible error against Defendant in Error.

The only complaint then that the Plaintiff in Error can have is that the jury either chose to disbelieve the testimony of Mr. McBride in that he did notify the Union Oil Company or that he did make contracts for future deliveries, or that, from the testimony, it was impossible to determine the amount of damage, if any, sustained by the Young Company.

— 2 —

The second question discussed by the Plaintiff in Error in his Brief is the rejection of the testimony pertaining to the cost of the dock and storage facilities. The third Amended Answer sets forth in the first affirmative defense that the necessary facilities for handling oils cost \$15,425.91, and that the expense of maintaining same during the life of the contract amounted to \$3,969.48, making the total cost of the storage facilities and their maintenance \$19,395.39. (Tr. p. 12, par. 4.) In the second affirmative defense, Plaintiff in Error again sets forth that the cost of said dock, warehouse and storage facilities cost \$15,425.91. (Tr. p. 16, par. 4.) Defendant in Error moved to strike from the third amended Complaint all allegations concerning cost of storage facilities and their maintenance (Tr. 542, 544), and further demurred to

said allegations for the reason that same did not state facts sufficient to constitute any basis for damages (Tr. pp. 548 to 550), and further objected to the introduction of any evidence tending to sustain such allegations. There is no allegation in either affirmative defense concerning the present value of the docks and storage facilities, neither is there any allegation that they are worthless.

In the Prayer Plaintiff in Error prays for the sum of \$9,681.86, which is the amount of the alleged profits. There is no Prayer for damages by reason of the expenditures of money on the storage facilities and their maintenance.

Plaintiff in Error sought to introduce this testimony, no doubt for the purpose of showing that Plaintiff in Error complied with all of the terms and conditions of said contracts by it to be performed. In Section 9 of Exhibit A, attached to the Complaint (Tr. p. 7), it is stated that Plaintiff in Error "Shall furnish at his expense such storage facilities as may be satisfactory to first party (Defendant in Error)."

We respectfully call the Court's attention to the admission made by the Defendant in Error on page 91 of the Transcript:

"MR. KELLEY: 'Just a minute, may it please Your Honor. The Plaintiff admits that the C. W. Young Company furnished such storage facilities which were satisfactory to the Plaintiff.'"

The Defendant in Error having admitted that the Plaintiff in Error complied with all the terms and conditions of its contracts respecting the furnishing of adequate storage facilities, that was no longer a disputed question, hence, the evidence offered immediately became immaterial. Even without this admission, there were no damages asked by reason of this expenditure, no damages prayed for, hence, it is elemental that there could be no recovery therefor.

Upon examination of all the authorities cited by the Plaintiff in Error, it will be found that in every case the complaint properly alleged and prayed for damages sustained by reason of expenditure of moneys in the fulfillment of the contract.

Counsel for Plaintiff in Error has cited the case of *U. S. vs. Behan*, 110 U. S. 338, 28 Law Ed. 168. In that case, after the United States Government had broken its contract, Behan sold to the highest bidder such materials, machinery, etc., which he had purchased to carry out his contract, and claimed damages for the difference between the purchase price and the sale price. This having been properly alleged in the complaint, the Court held that it was proper to introduce evidence to sustain such allegations.

In the case of *Wells vs. National Life Insurance Co.*, 99 Fed. 222, it was alleged in the complaint that Wells was appointed the general agent of the Life Insurance Company, and had expended certain moneys in advertising, traveling expenses, postage, etc., in

building up the business from which the Life Insurance Company reaped the benefit upon breaching the contract; it having been properly alleged, the Court held that evidence to support such expenditures was admissible.

We are inclined to believe that this evidence might have been admissible had the Plaintiff in Error brought his pleadings directly within the cases cited and made proper allegations of money expended and proper allegations of the present value of the docks and storage facilities, or a proper allegation that they are worthless, and prayed for damages sustained by reason thereof, but not having done so these cases become inapplicable.

It is conclusively shown by the testimony that this dock and warehouse and all buildings placed thereon did not become valueless; on the contrary, it is admitted by Mr. McBride and a number of other witnesses, that same was converted into a salmon cannery. (Tr. p. 294.)

— 3 —

Plaintiff in Error complains of Instruction XXIV, which was given by the Trial Court. While the Transcript does not disclose the fact, nevertheless, on the argument before the Court upon the motion of the Oil Company for a directed verdict in its favor, counsel for Plaintiff in Error cited to the Trial Court the case of *Beck vs. West*, 6 So. 70, 87 Ala. 213, as the

law of the case respecting the measure of damages. We quote the following from that case:

"On the testimony found in this record, we are not able to affirm that plaintiff violated any term of his contract, while the testimony, if believed, shows that West & Co., broke their contract by refusing to honor and pay Beck's drafts. What, then, are proper elements of damage entitling him to a recovery? He was clearly entitled to recover his share of the profits of sales made by him. So if he had arrangements for later sales which he could have perfected during his term, he is equally entitled to his share of the profits. But to fall within this class the negotiations must have proceeded, so far as that can be ascertained with certainty, that the sale would be made and the extent of it. *Mere expectations, doubtful offers or other vague and indefinite assurances of intention to purchase without expression of quantity or value, must be classed as speculative and hence not recoverable.*"

Beck vs. West, 6 So. 70, 87 Ala 213.

Counsel for Plaintiff in Error argues that this instruction was not warranted by the testimony and that the orders were definite in amount. We submit that these contracts are very indefinite in amount and character, and, as we have heretofore indicated, the jury either chose to disbelieve the testimony of Mr. McBride in that he did notify the Union Oil Company, or that he did not make contracts for future deliveries, or that from the testimony it was impossible to determine the amount of the damage, if any, sustained by the Young Company.

Mr. McBride testified that he made a contract with the Hoonah Packing Company through Mr. C.

J. Alexander. (Tr. p. 217.) Mr. Alexander in his deposition testified that he made no such contract with Mr. McBride. (Tr. pp. 465 and 466.)

Mr. McBride testified that he made a contract with the Gambier Cannery of the Hoonah Packing Company, through Mr. Bailey. (Tr. p. 224.) Mr. Bailey in his deposition testified that he did not make any contract with the C. W. Young Company or Mr. J. C. McBride, and that

“Whatever refined or lubricating oils were ordered, if any, were delivered immediately and paid for at the end of the month.” (Tr. p. 471.)

Mr. McBride testified that he made a contract with the Auk Bay Salmon Company through Billy Carlson. (Tr. p. 233.) Mr. Carlson in his deposition testified that he made no such contract and “All of the oils so purchased were delivered as soon as ordered.” (Tr. p. 468.)

Mr. McBride testified that he made a contract with the National Independent Fisheries Company through the captains on the boats “King and Wing,” “Scandia” and “Idaho,” but did not recall their names and did not know how much they could take at a single delivery, or how many times they called at the docks or what part of their yearly requirements they received. (Tr. pp. 237, 238, 239.) This certainly is very indefinite.

Mr. McBride testified that he had a definite con-

tract with James Davis, but James Davis in his deposition declined to state what his yearly requirements would be or how much of his yearly requirements he received from Defendant in Error, and how much he received at Petersburg, Ketchikan, or from the Standard Oil Company, or elsewhere. (Tr. pp. 392, 401, 403.) This is also true of Mr. Hunter's testimony in behalf of Hunter and Dickinson.

Pete Madsen denied in his testimony that he had any agreement whatever and that "I got my oil where I could and where it suited me best." (Tr. p. 255.)

Captain Tibbets of the launch "Pacific" was not able to determine definitely the amount of his yearly requirements or how much thereof he received. (Tr. pp. 354, 355.)

Mr. McBride could not tell who were the owners or captains of the launches "Olga" and "Oriole"—he had but one conversation with them and never saw them again. (Tr. pp. 262 and 263.)

The most favorable construction which can be placed upon this testimony is that Mr. McBride solicited business and the prospective customers told him that they would buy from him if he had the oil and could give them the service which they required, and some he heard from again and some he did not.

At the outside, these estimates placed by the various prospective customers were merely estimates of

their yearly requirements, part of which were filled and part were not.

We submit that this instruction complained of is entirely proper, as it was mere expectations, doubtful offers or vague or indefinite assurances of intention to purchase without expression of quantity or value, and it was for the jury to determine whether these contracts were reasonably certain of being filled and whether these contracts were something more than mere expectations, doubtful offers or vague or indefinite assurances of intentions to purchase.

Counsel for Plaintiff approves of Instruction XVII, which states in part:

“The C. W. Young Company is entitled to damages for the amount of that gain or benefit, and it is for you to fix the amount of such damage, if proved with reasonable certainty,”

and yet disapproves of that part of Instruction XIII which says:

“You, therefore, should consider only such contracts as you are satisfied from the evidence, are reasonably certain as to the amount and the date of consummation thereof. Mere indefinite promises are matters of speculation and can not be made the basis of a claim for damages.”

These instructions are certainly harmonious and Plaintiff in Error has no cause for complaint.

Counsel for Plaintiff in Error has cited a number of cases to show that Instructions XVI and XVII are

correct, but cited no cases to show that Instructions XIII and XXIV are incorrect.

Counsel cites the case of *Bredemeier vs. Pacific Supply Co.*, 131 Pac. (Ore.) 312. That case holds as follows:

“Where the damages claimed are so speculative and dependent upon numerous and changing contingencies that their amount is not susceptible of actual proof with any reasonable degree of certainty, no recovery can be had. 13 Cyc. 36; *Wisner vs. Barber*, 10 Or. 342; *Hoskins vs. Scott*, 52 Or. 271, 276, 96 Pac. 1112; *Hichhorn vs. Bradley*, 117 Iowa, 130, 90 N. W. 592.”

This holding certainly sustains Instructions XIII and XXIV.

Counsel for Plaintiff in Error also cites the case of *Hoskins vs. Scott*, 96 Pac. (Ore) 1112, wherein the Court holds as follows:

“But it is maintained that no proof was offered showing that plaintiff, if furnished with an engine and engineer, either could or would have run the machinery during the season contemplated, or that he had or could have procured contracts therefor, by reason of which there is a failure of proof as to one of the essential facts, and on account of which it is argued that the court should have either sustained the motion for nonsuit or directed a verdict for defendant. After testifying to facts tending to show that he could and would have run the machine during the season contemplated, if furnished with the engine and engineer agreed upon, plaintiff, on cross-examination, stated, in substance, that a number of people in the

vicinity had asked him to do threshing for them during the summer, and told him that, if he brought his machine to their respective farms, and did good work, he could have their threshing to do, and that nothing more definite was said about it, further than one person told him he would pay him five cents per bushel, and another stated there were about '20,000 bushels on the sticky run' that year. Upon testimony to this effect it appears that the estimate is based that he could have procured a 35-day steady run for his machine. In this connection, it is contended that the damages thus sought to be established are too remote and speculative to be recovered, which presents a question not easy of solution nor free from doubt. While the authorities are not harmonious on the subject of the right of a person to recover anticipated profits under such circumstances, the weight thereof appears to recognize what we deem the safer and better rule: If the damages can be ascertained with reasonable certainty, and the business of which the complaining party was deprived, causing the alleged loss of damage, was contemplated or could reasonably be presumed to have been contemplated by the parties at the time the contract was made, and the damages complained of are the natural and proximate consequence of such breach, a recovery thereof may be had. *Drake vs. Sears*, 8 Or. 209, 213; *Blagen vs. Thompson*, 23 Or. 239, 248, 31 Pac. 647, 18 L. R. A. 315; *Hockersmith vs. Hanley*, 29 Pr. 27, 36, 44 Pac. 497; *Hunt vs. Or. Pac. Ry. Co.* (C. C.), 13 Sawy. 516, 36 Fed. 481, 1 L. R. A. 842; *Griffin vs. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Messmore vs. N. Y. Shot & Lead Co.*, 40 N. Y. 422; *Wash. & G. R. Co. vs. Am. C. Co.*, 5 D. C. (App. Cas) 524, 541; *Howard vs. Stillwell, etc., Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147. But we think the evidence given insufficient to bring plaintiff's demands

within the rule announced, as the special damages sought cannot be ascertained therefrom with reasonable certainty. It does not follow, nor can it be assumed, that owing to plaintiff's machine having sufficient capacity, and because there was an abundance of grain in the vicinity to be harvested, and several parties had told plaintiff that he might thresh their grain if on hand and his machine did good work, etc., that they would have given him the work to do, or that he would have procured all or a large part of the threshing in the vicinity. Enforceable contracts should have been shown from which the quantity of grain he would probably have threshed, including probable losses, with reasonable certainty, could have been estimated; otherwise the damages sought were too speculative to be entitled to consideration."

We feel this case is very much in point with the case at bar and in view of the holdings therein made, Instructions XIII and XXIV were very properly given.

This rule is also laid down in 13 Cyc. 219, as follows:

"Anticipated profits, to be considered as a legitimate item of damage, must be shown with some degree of certainty and not be left to mere conjecture, the facts and circumstances showing the grounds and reason for the expected profits must appear with such certainty and fullness that the jury may estimate the amount without resorting to speculation or conjecture."

And 13 Cyc. 50, it is stated:

"Where the profits claimed are merely speculative and remote and are not capable of being

correctly ascertained, under the recognized rules of evidence, they have been invariably denied by the courts; whether such courts are claimed in action *ex delicto* or whether they are claimed in actions *ex contractu*."

The syllabus in the case of the *Central Coal & Coke Co. vs. Hartman*, 111 Fed. 96, reads as follows:

"The estimates, speculations or conjectures of witnesses unfound in the knowledge of actual facts, from which the amount of the damages could have been inferred with reasonable certainty, will no more sustain a judgment than the conjectures of a jury."

"Damages which are the natural and probable results of the breach of a contract and which may be reasonably anticipated therefrom, but which are so speculative and so dependent on numerous and changing contingencies that their amount is not susceptible of proof with any reasonable degree of certainty, may not be recovered."

Central Trust Co. vs. Clark, 92 Fed. 293, 298.

See also *Howard Mfg. Co.*, 139 U. S. 199;
Cohn vs. Telegraph Co., 46 Fed. 40.

The Supreme Court of the State of Washington in the case of *Church vs. Wilkeson Tripp Co.*, 58 Wash. 262, 108 Pac. 596, holds that the loss must be reasonably certain and not a fictitious and imaginary one.

In like manner the Supreme Court of the State of Kansas in the case of the *A. T. & S. F. Ry. Co. vs. Thomas*, 70 Kan. 409, 78 Pac. 861, 865, holds:

"Plaintiff does not sue for losses already sustained but for gain or profits which he claims were by defendant prevented. The unquestioned rule of the law is that damages of this character must be capable of being established with a reasonable degree of certainty, must be the natural and proximate consequences of the breach, and be free from conjecture and speculation."

That same court in the case of *States vs. Durkin*, 65 Kan. 101, 68 Pac. 1091, 1092, states:

"The plaintiff's business lacks duration, permanency and recognition. It was a venture as distinguished from an established business. Its profits were speculative and remote, existing only in anticipation. *The law, with all its vigor and energy in its effort to right wrongs and award damages for injuries sustained, may not therefore enter the domain of speculation or conjecture.*" See also *Paola Gas Co. vs. Paola Glass Co.*, 56 Kans. 614, 44 Pac. 621.

California holds to the same rule in the case of *Friedemann vs. McKay Leather Co.*, 179 Cal. 566, 178 Pac. 139, the first paragraph of the syllabus reading as follows:

"Where an agency contract for the sale of leather provided for commissions but the agency was not exclusive, the agents, upon breach of their principal, could not recover as damages profits to be realized as commissions on purely *suppositive* sales; such damages being speculative."

In the case of *Stephany vs. Hunt Brothers Company*, the California Court of Appeals, in an appeal from the Superior Court from the City and County of

San Francisco, on the 23rd day of June, 1923, and reported in 217 Pac. 797, 799, laid down the rule as follows:

"The conservatism pervading the law is against allowing damages purely speculative, fanciful, or imaginary. In order to entitle one to recover prospective profits he must show that the profits claimed were reasonably certain to have been realized but for the wrongful act complained of. * * * * * There can be no recovery of prospective profits unless there is a reasonably certain basis for the ascertainment."

The Court then cites the case of *Friedemann vs. McKay Leather Company*, 109 Cal. 566, 178 Pac. 139.

The case of *Russell vs. Olson*, 22 N. D. 410, 133 N. W. 1030, 37 L. R. A. N. S. 1217, Ann. Cas. 1914 B, 169, holds:

"While profits may be considered in proper cases in estimating damages, proof of them must be of a high character and not such that the jury are left to speculate or guess what, in fact, they are or would be."

Again referring to the Supreme Court of the State of Oregon, we desire to call the Court's attention to the case of *McGinniss vs. Studebaker Corporation of America*, 75 Ore. 519, 146 Pac. 825, 147 Pac. 525. It is stated:

"If reasonable certainty is not attained, and if it is speculative or doubtful whether a benefit would have been derived, then the complaining party must fail because adequate proof is lacking."

The Court then cites *Hoskin vs. Scott*, 52 Ore. 271, 96 Pac. 1112, to which we have heretofore referred, and also cites the case of *Beck vs. West*, 87 Ala. 213, 6 So. 70, to which we have referred, and upon which, we believe, the Court at the suggestion of counsel for Plaintiff in Error based the instruction complained of.

IN CONCLUSION

In conclusion the Defendant in Error respectfully calls the Court's attention to certain evidence introduced in the trial, upon which it relied for a verdict, together with a few citations of authorities in support thereof.

Mr. Trew testified that he was in Juneau in the latter part of August, 1918, and at that time he checked the account of the C. W. Young Company and

"That it was almost a hopeless task to make our books agree with theirs, and we accepted, mutually agreed at that time, to accept the figures that the C. W. Young Company's books showed."
(Tr. pp. 42, 46, 47, 56.)

and that he received payment up to and including December 31, 1917 (Tr. p. 46), and that the Young Company prepared a statement of the account due the Union Oil Company beginning January 1, 1918, which was introduced in evidence, marked Plaintiff's Exhibit 1, but which is not included in the Transcript (Tr. pp. 43, 45), and that there was a balance of \$6,316.48 due, owing and unpaid, and that

“Mr. McBride said he would pay it (the balance) as soon as he possibly could.”

All of which we alleged has not been disputed.

Defendant in Error contends that this constitutes a stated account and that Plaintiff in Error had no right to go back of it. In the case of the *Arkansas City Canning Co. vs. Dunston*, 64 Pac. 1025, it is held by a per curiam decision, that a request for additional time within which to pay constitutes a waiver of damages.

Defendant in Error contends that Plaintiff in Error violated the instructions given, in that all transactions were to be carried on in the name of the Oil Company, for the reason that the Oil Company wanted to be definitely identified with its customers (Tr. pp. 82, 428), and that it was not expected or anticipated that contracts for future deliveries were to be made by Plaintiff in Error. (Tr. pp. 89, 183.)

That Plaintiff in Error was allotted certain drums for Alaska and that unless these drums were returned promptly, shipment of oils could not be made, and that the Interstate Commerce Commission had prohibited the Oil Company from purchasing additional drums during the World War; that Plaintiff in Error knew all of this yet did not return the drums promptly, which necessitated Defendant in Error holding up shipments and making constant request for their return. (Tr. pp. 424, 428, 149, 151, 153, 156, 170, 176, 450, 451, 452.)

In the case of *Burke vs. Garden City Sand Co.*, 86 N. E. 1055, 237 Ill. 473, it was held that a manager of a cement plant, who used reasonable diligence in making shipments, was not liable owing to his inability to procure cars for its transportation. In that case it was no fault of the purchaser that cars could not be obtained, but in this case it was the fault of the purchaser that no drums for transportation were available.

We contend also that Plaintiff in Error violated its contract in selling to customers on credit and not for cash, and did not remit to the Oil Company promptly and that shipments were held up until payment was received. (Tr. pp. 63, 88, 241, 289, 453, 454, 427, 428, 430, 431, 385.)

Courts universally hold that the failure to pay when due relieves party from liability to make further shipments. See *Wood Curtis & Co. vs. Zurich*, 5 Cal. App. 252, 90 Pac. 51; *Burke vs. Garden City Sand Co.*, 237 Ill. 437, 86 N. E. 1055; *Raabe vs. Squire*, 148 N. Y. 81, 42 N. E. 516; *Faber vs. Houghan*, 36 Ore. 428, 59 Pac. 547.

That it was impossible for the customers specified in the Bill of Particulars to estimate exactly and positively what their requirements would be for one, two and three years in advance, and that any statements made by them would be mere speculation. (Tr. pp. 388, 389, 431.)

That from reports made by the Young Company to the Oil Company from time to time and the books and records of the transactions kept by the Oil Company, it shows that from December, 1915, to January 1, 1918, the Plaintiff in Error had refined oil products on hand at all times, and that, while occasionally his stock may have been low, he was in a position to supply the trade and was not completely out of products at any time. (Tr. pp. 436, 437.)

From the above testimony Defendant in Error submitted the case to the Court and jury and we feel that, upon due consideration of the same, no reasonable man could come to any different conclusion than that expressed by the jury in its verdict.

Therefore, by reason of the Motion to Dismiss, heretofore filed, and the testimony and authorities herein referred to, Defendant in Error respectfully submits that the judgment of the Trial Court should be affirmed.

Dated October 12th, 1923.

COONEY & KELLEY,

JOHN R. WINN,

Attorneys for Defendant in Error.

No. 4032.

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

C. W. YOUNG COMPANY, a corporation,

Plaintiff in Error,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR ALASKA, DIVISION
NO. ONE.

Motion to Dismiss Writ of Error

COONEY & KELLEY, AND
JOHN R. WINN,

Attorneys for Defendant in Error.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

C. W. YOUNG COMPANY, a corporation,

Plaintiff in Error,

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE TERRITORY OF ALASKA, DIVISION
NUMBER ONE, AT JUNEAU.

MOTION TO DISMISS WRIT OF ERROR

Comes now the above named Defendant in Error, Union Oil Company of California, a corporation, by Cooney and Kelley, and John R. Winn, its attorneys, and appearing specially herein for the purpose of this Motion only, moves the Court to dismiss the Writ

of Error and affirm the judgment of the Trial Court for the following reasons, to-wit:

I.

That the Certificate of the Trial Judge attached to the purported Bill of Exceptions is insufficient in this, to-wit: That said Certificate does not properly authenticate the Transcript of Record, including evidence introduced, offers to introduce evidence which was rejected, objections interposed, and all exceptions, if any, taken; does not properly authenticate the instructions to the jury; and does not show that any Bill of Exceptions was ever settled and allowed.

II.

That no exceptions were taken by Plaintiff in Error to the rejection of evidence upon which Plaintiff in Error bases his first and second Assignments of Error.

III.

That the purported exceptions taken by Plaintiff in Error to the Trial Court's instructions to the jury, upon which Plaintiff in Error has attempted to base its third, fourth, fifth and sixth Assignments of Error and each of them, are insufficient in this, to-wit:

That said purported exceptions are indefinite in character, indistinct in meaning and are not specifically directed to any particular instruction or instructions, and said purported exceptions do not call the attention of the Trial Court to any particular vice or error complained of.

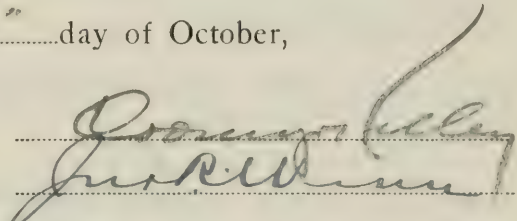
IV.

That no objection was made and no exception taken by Plaintiff in Error that Instruction No. XXXII conflicted with Instructions VIII, IX and XXIX.

V.

That no objection was made and no exception taken by Plaintiff in Error that Instructions XXIV and XIII conflicted with Instructions XVI and XVII.

Dated this.....12".....day of October,
A.D. 1923.

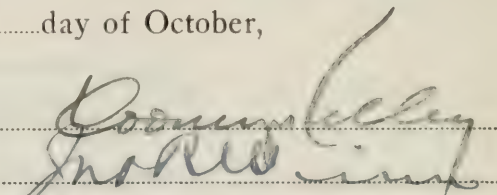


Attorneys for Defendant in Error.

To C. W. YOUNG COMPANY, the above named Plaintiff in Error, and to H. L. FAULKNER, its attorney of record:—

You, and each of you, will take notice that the above and foregoing Motion to Dismiss Writ of Error will be called for hearing before the United States Circuit Court of Appeals for the Ninth Circuit, at the courtroom of said Court, in the City and County of San Francisco, State of California, on the 29th day of October, A.D. 1923, and immediately prior to the time set by said Court for the hearing of this cause and matter upon the merits.

Dated this 12th day of October,
A.D. 1923.



Attorneys for Defendant in Error.

ARGUMENT AND AUTHORITIES

In support of the above and foregoing Motion to Dismiss, Defendant in Error respectfully submits for the consideration of the Court, the following Argument and Authorities:

I.

We submit that the Certificate of the Trial Judge, attached to the purported Bill of Exceptions, is insufficient in that it does not properly authenticate the Transcript of Record, including evidence introduced, offers to introduce evidence which was rejected, objections interposed, and all exceptions, if any, taken; does not authenticate the instructions of the Trial Court to the jury; and it does not appear therefrom that a Bill of Exceptions was ever settled or allowed.

On pages 515 and 516 of the Transcript of Record filed in this matter, two Certificates are set forth.

The first certificate reads as follows:

"CERTIFICATE OF REPORTER

"I, George W. Folta, the official court reporter who reported the proceedings and testimony in the trial of the above-entitled cause, hereby certify that the foregoing is a full, true and correct transcript of all the proceedings and testimony, both oral and documentary, offered and introduced in the trial of the foregoing action, and also of all exceptions taken and noted, together with the instructions given in the charge of the Court to the jury, together with all exceptions thereto; and I now certify the foregoing,

consisting of 434 pages, to be such transcript.

"In testimony whereof, I have hereunto signed my name at Juneau, Alaska, this twelfth day of April 1923.

"GEORGE W. FOLTA,
"U. S. Court Reporter."

Then following this certificate of the Reporter is found what purports to be a certificate of the Trial Judge, which reads as follows:

"CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

"And because the above and foregoing matters do not appear of record, I, THOS. M. REED, the Judge before whom said cause was tried, do hereby certify that the above and foregoing is a full, true and correct bill of exceptions, and contains all the evidence proposed on the trial of said cause, and I further order the said bill of exceptions to be filed and made a part of the record herein.

"Done this 5th day of May 1923, at Juneau, Alaska.

"THOS. M. REED,
"Judge."

It nowhere appears from this Certificate of the Judge, who tried the case, or any order in the record, that the 434 pages, which the Reporter states to be the record, is the real record in the case; nor can it be ascertained from the Certificate of the Judge that the Transcript referred to by the Reporter constitutes the record of the testimony and instructions of the case; nor is there any reference in the Certificate of the Judge that the Transcript referred to by the Reporter contains all offers to introduce evidence which was re-

jected and contains all objections interposed at the hearing and all exceptions, if any, taken; nor does the Certificate of the Judge state that the instructions, which the Reporter refers to in his Certificate, are the real instructions which were given to the jury; nor does it appear that any Bill of Exceptions was ever settled or allowed by the Trial Court.

We here invoke the principle of law laid down in the case of *Dalton et al vs. Haselett*, 182 Fed. 561, which states among other things that the

“Signature of the judge to orders allowing and settling bills of exceptions do not constitute a ‘signing’ of the bills within Act. Cong. June 6, 1900, c. 786, Par. 223, 31 Stat. 366, providing that the statement of the exceptions when settled and allowed shall be signed by the judge and filed with the clerk, etc.”

Also the following:

In the case of *John F. Maloney, Appt., v. O. H. Adsit*, 175 U.S., Page 278, 44 Law. Ed. Page 163. The Supreme Court in speaking of the necessity of the settling, allowing and signing of a bill of exceptions by the trial court states among other things: “An inspection of this record discloses that the bill of exceptions was not settled, allowed and signed by the judge who tried the case, but by his successor in office, several months after the trial. It is settled that allowing and signing a bill of exceptions is a judicial act, which can only be performed by the judge who sat at the trial.” We think that it is the settled doctrine of the Federal Courts and most of the State Courts that it must distinctly and specifically ap-

pear from the face of the record that the bill of exceptions was *signed, settled and allowed*, and it must appear as well distinctly and specifically what the bill of exceptions is and what it consists of.

For the foregoing reasons we respectfully submit to the Court that our Objections and Exceptions to the sufficiency of the Record and the lack of authentication of the same are well taken.

II.

That no exceptions were taken by Plaintiff in Error to the rejection of testimony upon which Plaintiff in Error bases its first and second Assignments of Error. We have carefully examined the Transcript of Record and we have been unable to find wherein it appears that Plaintiff in Error excepted to the Court's ruling in the rejection of testimony offered to prove the cost of the dock and storage facilities erected by Plaintiff in Error in compliance with the terms of its contracts. The only reference which we are able to find is on page 93 of the Transcript. The Trial Court states: "I will sustain the objection and allow you an exception," to which the counsel for Plaintiff in Error replied,

"Before the Court does that, I would like to have read to the Court or to me, from the notes, the admission of Mr. Kelley as to the furnishing of facilities. I want to get that, I want to know if it is admitted that these facilities were furnished after the contract was entered into."

There is nothing in the record to show that any other exception was ever taken and no further offer of the testimony was made, nor any further exceptions taken, after the counsel for Plaintiff in Error requested the Court to withhold the allowance of the exception.

No exception having been taken, it is obvious that the statement made by the Court that it would allow the Young Company an exception is superfluous and means nothing. An exception is an affirmative act to be exercised by the party himself and is not such an act that the Court can arbitrarily allow on its motion.

We are unable to find in the Transcript where any objections were made or exceptions taken to the rejection of the testimony concerning general business conditions in Alaska, and Plaintiff in Error does not urge same in his Brief filed herein.

If the Young Company did not make any objections or take any exceptions at the time that it offered to introduce this class of testimony or evidence, it waived same by not excepting to the statement and instructions of the Court to the jury, as the Court plainly instructed the jury that Plaintiff in Error could recover only for loss of profits.

III.

No proper exceptions were taken by Plaintiff in Error to the Trial Court's instructions to the jury. The

Court's instructions are contained on pages 491 to 514, inclusive, of the Transcript filed in this matter and consist of thirty-six instructions or charges. At the conclusion of the reading of the instructions to the jury by the Trial Court, counsel for Plaintiff in Error made the following objections and exceptions to the Court's instructions:

"MR. FAULKNER: 'The Defendant excepts to the instruction given by the Court to the effect that Plaintiff did not undertake to keep the Defendant supplied with sufficient oils on hand to supply the trade it could procure or the business it could procure; and we except to the instructions of the Court giving the definition of Speculative Damages; and the Defendant excepts to the instruction that the Defendant was not warranted in entering into any contracts or agreements for future deliveries of oils under the contract of 1915, unless the sales were confirmed.'"

These are the only exceptions taken by Plaintiff in Error to the thirty-six instructions given by the Court to the jury and we submit that these exceptions are insufficient in this, to-wit:

That they are indefinite in character, indistinct in meaning, and are not specifically directed to any particular instruction or instructions, and said purported exceptions do not call the attention of the Trial Court to any particular vice or error complained of.

The Assignments of Error were filed approximately six weeks after the completion of the trial and

counsel should not be permitted to wait that length of time, to examine carefully this large record and these long and exhaustive instructions and pick out what he claims to be error committed by the Trial Court, and then place those alleged errors under blanket assignments of error. This would be taking a decided advantage of the Trial Court in not pointing out at the time of trial and before the jury retired to deliberate on their verdict the alleged errors which the Court may have committed, and thus giving the Trial Court an opportunity to correct the same.

Exceptions are taken to the instruction to the effect that Plaintiff did not undertake to keep the Defendant supplied with sufficient oils on hand to supply the trade it could procure or the business it could procure. We are not able to determine to what instruction that exception is directed and we can not locate such an instruction given by the Trial Court to the jury. Plaintiff in Error in his Brief claims that this exception is directed to Instruction VIII, but we submit that that instruction does not so state. In no event, is any particular vice or error complained of.

The exception also goes to the instruction giving the definition of Speculative Damages. This exception might apply to a number of the Court's instructions. In the Brief of the Plaintiff in Error he contends that Instructions XIII and XXIV should not have been given, as the rule for Speculative Damages as laid down in them is incorrect, and then continues

by saying that the law applicable in this case and the rule for damages was properly laid down in Instructions XVI and XVII. We submit that the purported exception might be construed also to be taken to Instructions XVI and XVII as well as Instructions XIII and XXIV. It would have been impossible for the Trial Court to determine just what instruction counsel referred to and might have thought that he referred to XVI and XVII and determined that they were correct, as did counsel. Again the Trial Court's attention is not called to any particular vice or error complained of.

The purported exception also goes to the instruction to the effect that the defendant was not warranted in entering into any contract for the future delivery of oil under the contract of 1915 unless the sales were confirmed. Counsel for Plaintiff in Error says that this exception refers to Instruction XXIX, but we submit that the instruction does not state the necessity of confirming the sales, but refers to confirming of the contracts. It will be necessary to read the entire thirty-six instructions to determine what instruction counsel for Plaintiff in Error has reference to and again the Trial Court's attention is not called to any particular vice or error complained of.

This Court laid down the proper rule of law in the case of *U. S. vs. Hammond*, 226 Fed. 849, 851, when the exception was made as follows:

"Next as to measure of damages. We except to the measure suggested by the Court."

And also:

“I except to your Honor’s instructions with regard to interest.”

This Court stated, concerning these exceptions:

“It contains no intimation as to what proper element was claimed to be included, nor does it remotely suggest the idea that the charge was, for any reason, deemed inapplicable to the facts. No question of procedure is better settled in these courts than that an exception to a charge, in order to entitle one to have it entertained, must be sufficiently distinct and specific to direct the attention of the Court to the particular vice or error complained of, that the Court may see whether the objection is well founded and have an opportunity, before the jury retires, to correct the mistake, if one has been made.”

A number of cases were cited by Judge Van Fleet in his decision, including *McDermott vs. Severe*, 202 U. S. 600, 610; *Mobile, etc., Co., vs. Jurey*, 111 U. S. 584, 596, and Judge Morrow’s opinion in speaking for this Court in the case of *Montana Mining Co. vs. St. Louis M. & M. Co.*, 147 Fed. 897, 909; and the opinion of Judge Gilbert in speaking for this Court in the case of *Butte, etc., Mining Co., vs. Montana, etc., Co.*, 121 Fed. 524, 528.

Judge Ross in writing the opinion of this Court in the case of *Hammond vs. U. S.*, 246 Fed. 40, 47, laid down the same rule and cites the case of *McDermott vs. Severe*, 202 U. S. 600, and the case of *Baltimore & P. R. Co. vs. Mackey*, 157 U. S. 72, 86.

This Court also stated in the case of *Walter et al vs. Wild Goose Mining & Trading Co.*, 123 Fed. 209,

“The party objecting may be confined to the objection taken at the time, which must have been stated specifically.”

This case was an appeal from Alaska.

“Assignments of Error based on exceptions to the Court’s charge, not taken specifically and at the conclusion of the charge as expressly required by the rule of the Appellate Court, would not be considered.”

Barnes & Tucker Coal Co. vs. Vozar, 227 Fed. 25, 141 C.C.A. 579.

This rule was also enunciated in the case of *Yazoo and M. V. R. Co. vs. Wright*, 207 Fed. 281, 125 C. C. A. 25, when it stated

“An error in instructions will not be considered by the Appellate Court unless specifically excepted to or otherwise called to the attention of the Trial Court.”

Another clear-cut statement of the law is:

“Exceptions to be of any avail must present distinctly and specifically the ruling objected to. A case ought not to be left in such a condition after the trial that the defendant party may hunt through the record and if he finds an unsuspected error, attach to it a general exception and thus obtain a reversal of the judgment upon a point that may never have been brought into the court below.”

2 Encyc. U. S. Sup. Ct. Rep. 87.

We hold that Plaintiff in Error has attempted to do just what this citation says can not be done, that is,

to hunt through the record at leisure and find what it considers unsuspected error and then attach to it some general exception.

To this same effect the Circuit Court of Appeals for the Sixth District in the case of *Coney Island Co. vs. Dennan*, 149 Fed. 687, 691, stated:

“The counsel without any suggestion of error now complained, filed eight exceptions to the charge, of which one was to so much of it as related to the subject of contributory negligence, reciting brief parts of it but not indicating any ground on which the exception rested. Nor was there any disclosure of the point, now raised in the motion for a new trial, though from the opinion of the Court it would seem that it was raised in the hearing of the motion. We must, therefore, suppose that the counsel did not at the trial intend to present or have in mind the distinction between actual knowledge and the obligation to act upon it, and that it has developed upon subsequent examination of the record. In that case error could not be assigned upon the instruction, though faulty. Counsel were not bound to present their point at the trial, so that the court might consider it, and can not, under a broad exception not aimed at it, upon subsequent search for error and finding it, bring it forward as a ground for reversing the judgment. It is a well settled rule that an exception, in order to found a right to review, must be sufficiently distinct to direct the attention of the court to the particular error which is the subject of complaint. A challenge which is aimless, and points to nothing in particular, either in what is expressed or omitted, does not perform the object of an exception. And it is equally well established that when without special request the Court gives an instruction which is in the main

correct, but requires some modification or addition to make it so, it is the duty of counsel for the party whose interest requires the modification to ask for it or challenge the instruction because of the defect, and if they fail to do this they are deemed to be content with it. This assignment of error is also overruled."

The United States Supreme Court in the case of *Bogk vs. Gassert*, 149 U. S. 17, 25, states:

"Error is also imputed to the Court 'In adopting the theory announced throughout the instruction given on the part of the defendants that the transaction could not amount to a mortgage unless there was a personal liability on the part of the plaintiff upon which a recovery could be had, and error in giving conflicting instructions upon said matter.' This assignment is obviously too general. No exception taken to any theory announced by the court; but if there were it can not be valid, since the theory of the court must be expressed in particular language, and the exception should be taken to such language. Different persons derive different theories from the same language, and in this very assignment error is charged in giving conflicting instructions upon the same matter."

From the above citations we respectfully submit that the purported exceptions taken by the Plaintiff in Error to the instructions of the Court were not sufficiently distinct and specific to direct the attention of the Court to any particular vice or error complained of, and that Plaintiff in Error did not give the Trial Court an opportunity to consider and determine and, if necessary, to correct any error in the instructions which is now complained of.

IV.

Plaintiff in Error in its Brief on page 27 contends that Instruction XXXII conflicts with Instructions VIII, IX and XXIX, and also on pages 36, 37 and 38 contends that Instructions XXIV and XIII conflict with Instructions XVI and XVII. No objection or exception was taken, at the trial, to these instructions on this ground. The Court's attention was never called to this particular vice or error in any manner, whatsoever.

This Court, speaking through Judge Hunt, laid down the rule in the case of *Alverson vs. Oregon-Washington R. & Nav. Co.*, 236 Fed. 231, that the construction placed upon the contract by the Trial Court in its instructions can not be reviewed, where no different instructions on the point were requested and no exceptions taken to those given, and also that in Federal courts, exceptions to instructions given, or the refusal to give instructions requested, to be considered by an Appellate Court must be taken at the trial, and while the jury is at the bar, and *such fact must affirmatively appear*.

Many other cases might be cited to the same effect, but we think this Court has sufficiently enunciated the rule to make further citations unnecessary.

Defendant in Error respectfully submits that the Writ of Error should be dismissed and the judgment of the Trial Court affirmed for the reasons as above stated, and respectfully prays for such order.

COONEY & KELLEY,
JOHN R. WINN,
Attorneys for Defendant in Error.

No. 4032

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

C. W. YOUNG COMPANY (a corporation),

Plaintiff in Error,

vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Defendant in Error.

Upon Writ of Error to the District Court for Alaska,

Division One.

BRIEF FOR PLAINTIFF IN ERROR ON THE MOTION
TO DISMISS, AND REPLY BRIEF ON THE MERITS.

H. L. FAULKNER,

Attorney for Plaintiff in Error.

United States Circuit Court of Appeals

For the Ninth Circuit.

C. W. YOUNG COMPANY (a corporation),

Plaintiff in Error,

vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Defendant in Error.

Upon Writ of Error to the District Court for Alaska,
Division One.

BRIEF FOR PLAINTIFF IN ERROR ON THE MOTION TO DISMISS, AND REPLY BRIEF ON THE MERITS.

On the Motion to Dismiss the Writ of Error.

It is sufficient to say that if every one of the alleged reasons set forth on pages 2 and 3 of the motion of defendants in error were based on facts, no cause would have been shown why the *writ of error* should be dismissed.

If it be presumed, however, that paragraph 1 on said page 2 is meant to assert a *reason why the bill of exceptions should be stricken*, the reason asserted would be likewise unavailing for that purpose. The judge who tried the case (having extended until

May 19, 1923, the time for “settling the bill of exceptions”) signs (on May 5, 1923) a certificate that

“the above and foregoing is a full, true and correct bill of exceptions and contains all the evidence proposed on the trial of said cause and I further order the said bill of exceptions to be filed and made a part of the record.”

“The above and foregoing” is an account of the proceedings at the trial—embraces everything that was done (or *offered*) from the beginning of the trial to the conclusion of the Instructions.

The certificate of the judge immediately follows the stenographer’s certificate. (Tr. p. 515.) When this is the case the stenographer’s certificate is adopted by the judge. (2 R. C. L. Sec. 116, page 143.)

The bill says “Plaintiff rested”. (Tr. p. 165.) “Defendant rested”. (Tr. p. 490.) Plaintiff “That’s all”. (Tr. p. 490.)

While it is the better practice to insert in the certificate an affirmative statement to the effect that it contains all the evidence offered at the trial, it is sufficient when this fact can be gathered by inference.

Clyatt v. U. S., 197 U. S. 207, 49 L. Ed. 726;
Gunnison v. Rollins, 173 U. S. 255, 43 L. Ed.
68;

Crowe v. Trickey, 204 U. S. 228, 51 L. Ed.
454.

Manifestly Dalton v. Hazlett and Malony v. Adsit (cited on p. 7 of Defendant's Brief) are beside the question. The judge certifies that the bill contains all the evidence "proposed" on the trial. "Proposed" as so used is even broader than "received". Evidence at a trial cannot be received unless it is "proposed". "Proposed" includes, then, all evidence "proposed" and "*received*" and all evidence proposed and *not* received.

If it be assumed that the grounds set forth in paragraphs II, III, IV and V of the motion are meant to be urged as grounds why, on the hearing on the merits, this Court will not look into the points made in our brief on the merits, it is sufficient to say that the exceptions on which the assignments of error are based appear in the proper place in the record and are sufficiently definite to raise the points which we seek to have reviewed.

On the Merits.

In their statement of the issues defendant in error says that in the second cause of action the Oil Company

"Alleges that it sold to the Young Company in one sale and not under the terms and conditions of said contract of agency, goods, wares and merchandise of the agreed value of \$2,578.31".

This is not correct and the allegation referred to is found in Paragraph III of the second cause of action. (Tr. p. 4.)

In brief of defendant in error it is argued that the defendant in error admitted on the trial that the contract of agency and the relationship created thereby was that of principal and factor, and counsel contends that it was also admitted that it was the intention of the parties to the contract to keep stocks of goods on hand at Juneau; and counsel therefore argue that plaintiff in error has no cause to complain; but our complaint is that the trial Court's instructions were not applicable to these admitted facts and were not applicable under the pleadings and the facts admitted and proved upon the trial.

Counsel in this connection calls attention to the testimony of Mr. McBride found on pages 199 and 201 of the transcript, in which Mr. McBride stated that he could not tell from the records of the Young Company what particular orders sent to the Oil Company were filled and what particular orders were not filled. Of course this is true and Mr. McBride could not identify any particular shipment, but the contract alleged and proved, provided that the Oil Company was to furnish the Young Company with sufficient oil to meet the requirements of the trade and we are not concerned with any one particular shipment but are only concerned with the question as to whether the Oil Company com-

plied with the terms of the contract in keeping the Young Company supplied with sufficient oils and products to supply the trade and we are concerned only with the amount actually sent the Young Company and the amount actually needed to supply the trade. The commissions the Young Company would have received upon the difference between the amount of oil and products actually needed to supply the requirements of the trade and the amount sent by the Oil Company to Juneau, would be the amount of damages resulting in the Oil Company's breach of the contract.

We will take up the questions presented upon this appeal in the same order as they are set forth in brief of defendant in error.

I.

Counsel state on pages 8 and 9 of their brief that the Court's Instructions Nos. VIII, IX and XXIX were clear and concise and that the gist of them was that it was the duty of the Young Company to notify the Oil Company of *all sales and orders or contracts for future deliveries* and that it was the duty of the Oil Company to deliver to the Young Company such commodities as it might order to meet the sales and orders on contracts for future delivery of which it was notified, and if the failure on the part of the Oil Company so to do resulted in damage to the Young Company, a recovery can be had.

This we contend is not the gist of the Instructions complained of. In Instruction No. VIII the Court told the jury that

“The presumption is, under the general terms of the contract plead, that the defendant would notify the plaintiff of *all orders or contracts for the sale of oil* received by it and that deliveries would be made by plaintiff according to such notification.” (Italics ours.)

To the same effect is Instruction No. IX; and in Instruction No. XXIX the Court said that

“Defendant was not warranted in entering into *any contracts or orders* for the sale of refined or lubricating oils, the delivery of which was to be made in the future; and defendant cannot recover any sum as damages for loss of profits on such contracts or orders unless such contracts or orders were confirmed by the plaintiff after notice thereof by defendant.” (Italics ours.)

Counsel cite on pages 9 and 10 of the brief certain portions of the testimony in an effort to show that it was the intention of the parties to the contract that orders received by the Young Company should be confirmed by the Oil Company; but an examination of *all the letters* from which portions are quoted (Tr. pp. 82 to 90) does not sustain any such contention. One of these letters states that the Young Company is not authorized to quote prices on cannery business for shipment *direct from Seattle*. This is undoubtedly true and plaintiff in error claimed no damages for loss of any such busi-

ness. On page 10 of counsel's brief a portion of a paragraph of the letter dated March 24, 1915, is quoted but the whole paragraph found on page 183 of the transcript is as follows:

"We have changed your order from two barrels of floor oil to five cases. *We are under the impression that two barrels of this commodity would greatly overstock you.* However if you have business in mind that we do not know of please advise and we will send what you wish with your next order."

The portions of letters quoted by counsel on pages 9 and 10 are not pertinent to this inquiry.

Counsel cite authorities on the proposition that an agent owes loyalty to his principal's interest and that fraud deprives an agent of the right to compensation. No doubt the authorities cited by counsel on this proposition so hold, but by no flight of the imagination can counsel contend that it any where appears in the record that the Young Company attempted to act independently or to make independent contracts between the Oil Company and purchasers of oil and products in Alaska. There was no liability on the part of the Oil Company to supply oil to the Young Company's customers direct. The Oil Company was liable only to the Young Company. It was not sought to create any liability on the part of the Oil Company for damages to any customer of the Young Company for its failure to supply oil. The Oil Company dealt with no one but the Young Company.

Counsel cite many authorities to sustain the proposition that in order to recover special damages for breach of contract between vendor and vendee the circumstances must be known to both parties at the time contract was entered into.

This is undoubtedly true but in this case the contention is that the circumstances were known to both parties at the time the contract was entered into. The Young Company agreed to build a dock, warehouse, etc., and furnish storage facilities for the handling of the Oil Company's products, and the Oil Company on the other hand agreed to furnish the Young Company with sufficient oils and products for sale to meet the ordinary requirements of the trade in the territory designated. The contract provided that the Young Company should receive as its compensation certain commissions, and of course the circumstances were known to both parties at the time; and the Oil Company could not possibly have failed to know that if it failed to furnish the oil as provided in the contract, the Young Company would be damaged to the extent of the lost commissions.

Counsel has cited on pages 16-17 of their brief the case of the Central Trust Company v. Clark, 92 Fed. 293, 297, to sustain their contention, but the citation on page 17 of counsel's brief is that

“Such damages only as are implied by the contract itself, such as would naturally flow from its breach in the usual course of things,

such as would reasonably be anticipated by the parties to such contracts in the great multitude of cases, and such damages only may be recovered.”

We contend that it is such damages as mentioned in this citation that the Young Company claimed.

Counsel argue that the Young Company introduced testimony showing notification to the Oil Company of orders received by the Young Company which could not be filled; and counsel therefore argue that the Court’s Instructions complained of were correct because of this testimony, and on page 18 of their brief they quote one question and one answer of Mr. McBride to the effect that he notified the Union Oil Company of the orders which he had and could not fill. The page of the transcript where this occurs is not given by counsel in their brief but it is found on page 158, and an examination of the question quoted and the following three questions, discloses the fact that this testimony was to the effect that Mr. McBride complained to the Oil Company of the repeated shortages and even went to Seattle personally to take the matter up with the Oil Company. This notification was necessarily *after he had ordered the oil to be shipped and the Oil Company had failed to ship it*, to supply the ordinary requirements of the trade as agreed upon in the contract. Mr. McBride went to Seattle for the purpose of complaining about the shortages.

II.

The matter of the Court's refusal to permit testimony as to the cost of the dock and storage facilities for handling the oils has been covered in our opening brief, but counsel state that there was no allegation that the dock and storage facilities were not now worthless and no allegation of their present value. This would be a matter of defense to our claim and plaintiff in error was precluded from proving their present value when the Court rejected the testimony as to their cost.

Counsel state on page 22 of their brief that the record shows that the buildings and dock are not now valueless but were converted into a salmon cannery. This is beside the question but if there is a cannery there and it is worth anything, defendant in error would have been able to prove it and would scarcely have been so anxious to shut out our offer to prove the cost and expense of the dock and storage facilities.

III.

Counsel refer to certain testimony of Mr. McBride and some witnesses who contradicted him to sustain the applicability of the Court's Instruction No. XXIV to the effect that

“Mere expectations, doubtful offers or other vague and indefinite assurances of intention to purchase without expression of quantity or value must be classed as speculative and hence not recoverable.”

But an examination of this testimony, as stated in our opening brief, discloses the fact that there was nothing vague or indefinite about it.

Counsel cite testimony of Pete Madsen. (Tr. p. 455.) It will appear from an examination of this testimony that Madsen only stated that he had no contract with anybody, but when he was asked on cross examination if he ever went to the Union Oil Company's dock for oil and failed to get it, counsel objected and the objection was sustained.

The authorities cited by counsel are applicable to cases where the testimony establishes only mere expectations, doubtful offers and vague and indefinite assurances, etc., without expressions of quantity or value, but they are inapplicable to this case.

Conclusion.

Counsel in the conclusion of their brief contended in effect that the case should be affirmed because they had some testimony that Mr. McBride and the bookkeeper of the Young Company agreed to the amount of oils received by them and not accounted for, and that this constituted an account stated; and counsel contended that the trial Court erred in not taking the view that the action was on an account stated and that the evidence established this fact. Even if this were so and the Court erred in this respect, two wrongs do not make a right and

counsel are hardly justified in asking this Court to affirm the judgment of the lower Court upon the theory that even though the trial Court erred in submitting the issues to the jury and invaded the province of the jury by the assumption of certain facts, still because the Court also erred against the defendant in error the judgment should stand; but plaintiff did not sue upon an account stated, and even if it had, the undisputed evidence did not establish any such thing. And defendant in error has assigned no errors here.

As stated in our opening brief the matter of return of empty drums and the making of prompt settlements were an afterthought, for in the pleadings the plaintiff in error denied the very existence of the oral contract. (Tr. p. 22.) If any such cause for complaint existed the Oil Company after over two years of dealings with the Young Company under the oral contract of 1915 would scarcely have entered into a new contract, as they did in 1917, and reduce the new contract to writing without any mention of the return of empty drums or making of prompt settlements. But it was natural for the Young Company to enter into the new contract of 1917, in an endeavor to recoup its losses sustained during the first two years of the oral contract; and the testimony quoted in our opening brief discloses the fact that there were offers and promises on the part of the Oil Company from time to time to live up to its agreements contained in the contract.

However, all this is beside the question for it was not pleaded as a defense to our counter claims, and even if it had been it would have no bearing upon the erroneous instructions complained of and the discussion of it has no place in the presentation of this appeal.

Dated, San Francisco,

October 27, 1923.

Respectfully submitted,

H. L. FAULKNER,

Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SOLOMON K. LALAKEA,
Plaintiff in Error,
vs.
HANNAH MAKAINAI,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

FILED

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F. D. HOLLOMAN
CLERK

United States
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SOLOMON K. LALAKEA,
Plaintiff in Error,
vs.
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Transcript of Record.

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Territory of Hawaii.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Supreme Court of the Territory of Hawaii,
October Term, A. D. 1920.

On Error from the Supreme Court of the Territory
of Hawaii to the Circuit Court of the Fourth
Judicial Circuit.

HANNAH MAKAINAI,
Plaintiff (Defendant in Error),
vs.

SOLOMON K. LALAKEA,
Defendant (Plaintiff in Error).

Petition for Writ of Error.

To the Clerk of the Supreme Court:

Please issue a writ of error in the above-entitled case to the Clerk of the Circuit Court of the Fourth Judicial Circuit on behalf of Solomon K. Lalakea, one of the parties in the said cause, returnable to the Supreme Court.

Dated at Hilo, Hawaii, June 25, 1921.

SOLOMON K. LALAKEA.

By _____.

And C. S. CARLSMITH, his Attorney.

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. October Term, A. D. 1920. Hannah Makainai, Plaintiff-Defendant in Error vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Petition for Writ of Error. Recd. \$25.00. Filed June 28, 1921, at 9:45 A. M. J. A. Thompson, Clerk. C. S. Carlsmith, Attorney for Plaintiff in Error. [1*]

*Page-number appearing at foot of page of original certified Transcript of Record.

[Title of Court and Cause.]

Assignment of Errors.

Comes now Solomon K. Lalakea, defendant in an action in ejectment lately pending in the Circuit Court of the Fourth Circuit, and feeling himself aggrieved at the rulings, orders, decisions and judgments heretofore rendered by the Circuit Court of the Fourth Judicial Circuit, says that the said Court committed error in the cause aforesaid as more particularly set forth in the following assignment of errors:

Assignment No. 1.

That the said Court committed error on the 28th day of June, A. D. 1920, in refusing to grant the motion of the defendant for a continuance.

Assignment No. 2.

That the said Court committed error in that, upon its own motion, it undertook an unnecessary, unfair and hostile examination of the defendant, Solomon K. Lalakea, while the said defendant was upon the witness-stand as a witness on his own behalf (see Transcript, pages 28-61).

Assignment No. 3.

That the said Court committed error [2] in that, upon the 1st day of September, A. D. 1920, and after both plaintiff and defendant had rested and submitted the cause for the consideration of the Court, the said Court called to the witness-stand one O. T. Shipman, and proceeded to examine the said witness.

Assignment No. 4

That the said Court committed error in this, that the said Court examined O. T. Shipman in a manner intended and calculated to prejudice the defendant in his cause.

Assignment No. 5.

That the said Court committed error in its ruling, decision and finding, whereby the said Court found and decided that Thomas K. Lalakea at any time executed or delivered the deeds alleged to have been executed by him on March 6th, 1915.

Assignment No. 6.

That the said Court committed error in its ruling, decision and finding as follows: "Their attitude entirely changed as to the defense between January 28th, 1920, the date of the decision of the Trial Court overruling the motion for a nonsuit, and May 28th, 1920, when they put in their defense."

Assignment No. 7.

That the said Court committed error in its ruling, decision and finding as follows: "No explanation was offered or attempted as to why Namahoe was sent for by Thomas K. Lalakea to witness his signature."

Assignment No. 8.

That the said Court committed error in its ruling, decision and finding as follows: "The circumstances point to the fact that whoever signed these deeds they were signed the same day that T. K. Lalakea died." [3]

Assignment No. 9.

That the said Court committed error in its ruling,

decision and finding as follows: "Upon these considerations alone this Court would be justified in finding that there was no delivery."

Assignment No. 10.

That the said Court committed error in its ruling, decision and finding as follows: "In addition to these facts as bearing upon the question of delivery the Court finds that this deed, together with the other deeds that had been prepared by Mr. Shipman were still in the possession of the alleged grantor after his death. The defense took these deeds from the bureau which was the private bureau of the deceased, and in which the other papers of T. K. Lalakea had been kept."

Assignment No. 11.

That the said Court committed error in its ruling, decision and finding as follows: "But in view of the defendant's positive testimony that he never kept these papers in the bureau he cannot claim possession of the deed upon any possible theory that he kept this deed as his own."

Assignment No. 12.

That the said Court committed error in its ruling, decision and finding as follows: "The facts fall very far short of being sufficient to constitute a delivery."

Assignment No. 13.

That the said Court committed error in its ruling, decision and finding as follows: "I find that from the situation as presented by the testimony of the defendant, even assuming such to be true, no other conclusion can be drawn than that T. K. Lalakea

attempted to effect a testamentary disposition of his property.” [4]

Assignment No. 14.

That the said Court committed error in its ruling, decision and finding as follows: “Thus, assuming the alleged deed to have been executed, there was no delivery sufficient to pass title.”

Assignment No. 15.

That the said Court committed error in its ruling, decision and finding as follows: “This is a mixed question of law and fact.”

Assignment No. 16.

That the said Court committed error in its ruling, decision and finding as follows: “This deed is testamentary in character, and is good only as a will.”

WHEREFORE said Solomon K. Lalakea submits said assignments, and prays that the judgments in said cause and the rulings complained of be reversed, and the cause be remanded for further appropriate proceedings.

Dated Hilo, Hawaii, June 25, 1921.

SOLOMON K. LALAKEA.

By _____.

And C. S. CARLSMITH, His Attorney.

To Messrs. Russell & Patterson, Attorneys for
Hannah Makainai.

You are hereby notified that an application for a writ of error has been filed in the above-entitled cause.

SOLOMON K. LALAKEA.

By C. S. CARLSMITH,

Attorney for Solomon K. Lalakea. [5]

Acceptance of Service.

Service of the foregoing assignments of error is hereby acknowledged this 7th day of July, 1921.

RUSSELL & PATTERSON,
Attorneys for Hannah Makainai.

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii October Term, A. D. 1921. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Assignment of Errors. Filed June 28, 1921, at 9:45 A. M. and Issued for Service. J. A. Thompson, Clerk. Returned July 9, 1921, at 9:57 A. M. J. A. Thompson, Clerk. C. S. Carlsmith, Attorney for Plaintiff in Error. [6]

[Title of Court and Cause.]

Bond of Plaintiff in Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Solomon K. Lalakea, as principal obligor, and the Fidelity and Deposit Company of Maryland, as surety, are bound and firmly held unto Hannah Makainai in the penal sum of Two Thousand Dollars (\$2,000.00) for the payment of which well and truly to be made, we do hereby bind ourselves, and the heirs, executors and administrators of the principal obligor, and the successors of the surety, jointly and severally firmly by these presents.

Signed with our names and sealed with our seals on this 2d day of May, A. D. 1921.

The condition of the foregoing obligation is such that the said principal obligor has filed, or is about to file, in the Supreme Court of the Territory of Hawaii, a petition for a writ of error in the above-entitled cause, for the purpose of modifying or reversing the judgment of the Circuit Court of the Fourth Judicial Circuit, made and filed in the said last-named court on the 9th day of February, A. D. 1921, in which said cause Hannah Makainai was plaintiff and Solomon K. Lalakea [7] was defendant; and the said principal obligor has undertaken that he will pay the amount of the judgment so filed in the Circuit Court of the Fourth Judicial Circuit in the cause aforesaid, or that he will pay such part thereof as shall finally be adjudged against him upon the said writ of error in case of his failure to sustain said writ of error; now if the principal obligor shall fail to sustain his said writ of error, and shall pay the amount of the said judgment heretofore rendered against him, then this obligation shall be void and of no effect, otherwise of full force and effect.

SOLOMON K. LALAKEA.
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

[Seal]

By ARTHUR BERG,
Attorney in Fact.
By RALPH C. SCOTT,
Agent.

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. October Term, A. D. 1920. Hannah Makainai, Plaintiff (Defendant in

Error), vs. Solomon K. Lalakea, Defendant (Plaintiff in Error). Bond of Plaintiff in Error. Filed June 28, 1921, at 9:45 A. M. J. A. Thompson, Clerk. C. S. Carlsmith, Attorney for Plaintiff in Error. [8]

[Title of Court and Cause.]

Writ of Error.

To the Clerk of the Circuit Court of the Fourth Judicial Circuit:

Application having been made on behalf of said Solomon K. Lalakea for a writ of error in the above-entitled case, you are commanded forthwith to send to the Supreme Court the record in said case.

WITNESS the Honorable JAMES L. COKE, Chief Justice of the Supreme Court, this 28th day of June, 1921.

[Seal]

J. A. THOMPSON,
Clerk of the Supreme Court.

Received the above Writ of Error on this 30th day of June, 1921, at 10 o'clock A. M.

T. J. RYAN,
Clerk Circuit Court, Fourth Circuit.

To the Clerk of the Supreme Court:

The execution of the within Writ of Error appears by the record hereto annexed.

Dated, Hilo, Hawaii, Aug. 15, 1921.

[Seal]

T. J. RYAN,
Clerk Circuit Court, Fourth Circuit, Territory of Hawaii. [9]

[Endorsed]: Number 1345. Supreme Court. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Writ of Error. Filed June 28, 1921, at 11:30 A. M., and issued same. J. A. Thompson, Clerk. Returned August 16, 1921, at 10:20 A. M. J. A. Thompson, Clerk. [10]

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

January Term, 1918.

HANNAH MAKAINAI,

Plaintiff,

vs.

SOLOMON K. LALAKEA,

Defendant.

Plaintiff's Amended Complaint.

To the Honorable CLEMENT K. QUINN, Judge of the Fourth Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

The undersigned, Hannah Makainai, residing in Hilo Island and County of Hawaii, Territory of Hawaii, plaintiff herein, complaining of Solomon K. Lalakea, defendant herein respectfully shows unto this Honorable Court as follows:

First: That Thomas K. Lalakea, father of plaintiff, departed this life at Hilo aforesaid, intestate, on the 7th day of May, A. D. 1915, being at the time of his death seised and possessed of the fol-

lowing pieces or parcels of land, situate within the jurisdiction of this Honorable Court:

(1) All that tract of land situate at Kukuihaele, Hamakua, County and Territory of Hawaii, described in R. P. 933, conveyed to him, the said Thomas K. Lalakea by Keamo by deed dated the 16th of October, 1903, containing an area of 103 acres, more or less and being a portion undivided, of the Estate of,

(2) All that tract of land situate at Kukuihaele, aforesaid, described in R. P. 933, conveyed to him, the said Thomas K. Lalakea, by Pihana (W.) by deed dated the 18th of November, A. D. 1911, containing 103 acres, more or less, and being a portion undivided, of the Estate of Mokeawe. [11]

(3) All that certain tract of land situate at Kaiwilahilahi North Hilo, County of Hawaii aforesaid, described in R. P. 2729, conveyed to him, the said Thomas K. Lalakea, by J. Poka Hanaaumoe by deed dated the 14th of September, 1885.

(4) All that certain tract of land situate at Waiakea, South Hilo, County of Hawaii aforesaid, conveyed to him the said Thomas K. Lalakea by the Reverend W. M. Kalaiwaa by deed dated the 3d of December, 1908.

(5) All that certain tract of land situate at Punahoa, 1, South Hilo aforesaid, containing .48 acre, described in R. P. 2176, L. C. A. 465, conveyed to him, the said Thomas K. Lalakea, by S. Kane by deed dated the 8th of August, 1899.

(6) All that certain tract of land situate at Papaa, South Hilo, aforesaid, containing 11 acres, described in R. P. 1948, L. C. A. 190, conveyed to him, the said Thomas K. Lalakea, by S. Kane by deed dated the 8th of August, 1899.

(7) All that certain tract of land situate at Kapehu, North Hilo aforesaid, containing .48 acre described in R. P. 1393, conveyed to him, the said Thomas K. Lalakea, by S. Kane by deed dated the 8th of August, 1899.

(8) All that certain tract of land situate at Punahoa, 2, South Hilo, aforesaid containing 50 acre described in R. P. 1149, L. C. A. 387, conveyed to him, the said Thomas K. Lalakea, by Kalaona Kalana by deed dated the —.

(9) All that certain tract of land situate at Puueo, South Hilo, aforesaid, containing .75 acre, conveyed to him, the said Thomas K. Lalakea, by Hokukela by deed dated the —.

(10) All that certain tract of land situate at Kauhiula, South Hilo, aforesaid, containing 14.33 acres, described in R. P. 133, conveyed to him, the said Thomas K. Lalakea, by Mana and Iakopa by deed dated the 27th of November, 1883. [12]

(11) All that certain tract of land situate at Punahoa, 2, South Hilo, aforesaid, containing 835 square feet, conveyed to him, the said Thomas K. Lalakea, by the first Hawaiian Church of Hilo by deed dated the 12th of February, 1908.

(12) All those two certain lots situate at Ku-kua, South Hilo, aforesaid, containing respectively 1407.32 and 4592.18 square feet, and that

certain lot situate at Halepuna, South Hilo, aforesaid, containing 1 acre, more or less, described in R. P. 2979, all of which said lots were conveyed to him, the said Thomas K. Lalakea by Mrs. Kaili Keolanui by deed dated the 27th of November, 1908, and recorded in the Hawaiian Registry of Conveyances in Liber 340 on pages 210-411.

(13) All that certain lot situate at Olaa, Puna, County of Hawaii aforesaid, containing 10 acres designated as lot 37 and described in L. P. 5066, together with that certain lot situate at said Olaa, designated as lot 38 and described in L. P. 4942, both of which said lots were conveyed by Kini Koa-kulana to him, the said Thomas K. Lalakea by deed dated the 27th of November, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 335 on pages 351, 352.

(14) All that certain lot situate at Kaiwiki, South Hilo, aforesaid, containing 10 acres described in R. P. 4119, conveyed to him the said Thomas K. Lalakea, by Yamafushi Keokichi by deed dated the 9th of November, 1903, and recorded in the Hawaiian Registry of Conveyances in Liber 250 on pages 4, 5.

(15) All that certain lot of land situate at Kaiwiki, South Hilo, aforesaid, containing 16.75 acres, described in R. P. 4298 and conveyed to him the said Thomas K. Lalakea by Watanabe Toyosake by deed dated the 8th of December, 1902, and recorded in the Hawaiian Registry of Conveyances in Liber 241 on pages 351-356. [13]

(16) A $\frac{1}{4}$ interest undivided in and to that tract of land situate at Kalapana Puna aforesaid, conveyed to him the said Thomas K. Lalakea by Sam Kanakaole by deed dated the 8th of December, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 352 on pages 422-424.

(17) All that certain lot of land situate at Halepuna, Puna, aforesaid, containing 4.22 acres described in R. P. 998, and conveyed to him the said Thomas K. Lalakea by W. K. Kealawaa by deed dated the 2d of February, 1906, and recorded in the Hawaiian Registry of Conveyances in Liber 340 on pages 38, 39.

(18) All that certain tract of land situate at Kukuihaele, Hamakua aforesaid, containing 3.35 acres described in R. P. 7872 and conveyed to him, the said Thomas K. Lalakea by Elisa Hawailepolepo by deed dated the 20th of June, 1905, and recorded in the Hawaiian Registry of Conveyances in Liber 370 on pages 384, 385.

(19) All that certain tract of land situate at Maonolulu, North Hilo, aforesaid containing 81 acres, described in R. P. 2320.

(20) All that certain tract of land situate at Mokuhonua, South Hilo, aforesaid being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him, the said Thomas K. Lalakea, by Joe Nahona Rock by deed dated the 17th of May, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 181, on pages 205, 206.

(21) All that certain tract of land situate at Mokuhonua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him, the said Thomas K. Lalakea by Kailiula by deed dated the 18th of May, [14] 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 183 on pages 82, 83.

(22) All that certain tract of land situate at Mokuhonua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132 conveyed to him the said Thomas K. Lalakea, by Kailiula by deed dated the 10th of August, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 186 on pages 71, 72.

(23) All that certain tract of land situate at Mokuhonua, South Hilo aforesaid, being a $\frac{1}{2}$ interest in and to an undivided $\frac{5}{12}$ interest in 12 acres, a portion of the land described in R. P. G. 1034.

Second: That plaintiff, as an heir at law of the said Thomas K. Lalakea, deceased intestate, is entitled to an undivided one-eighth part or share in the said lands.

Third: That said Solomon K. Lalakea has unjustly and contrary to law and the rights of plaintiff, taken into his possession and converted to his own use, the lands hereinabove described, and has excluded plaintiff from the use, occupation and enjoyment thereof, to the damage of plaintiff in the sum of Ten Thousand Dollars.

WHEREFORE, plaintiff prays the process of this Honorable Court to cite the said defendant to appear and answer this complaint before a jury of the country as provided by law, unless sooner disposed of by judicial authority, and the plaintiff may have restitution of said property with damages for its retention in the sum of Ten Thousand Dollars.

Dated: Hilo, Hawaii, December 18, 1920.

HANNAH MAKAINAI,

Plaintiff.

By RUSSELL & PATTERSON,

Her Attorneys. [15]

Territory of Hawaii,
County of Hawaii,—ss.

Now comes Fred Patterson, and being first duly sworn on oath deposes and says that he is one of the attorneys for Hannah Makainai, plaintiff above named; that he has read the foregoing complaint and knows the contents thereof; that he has signed the same for and on behalf of her, the said Hannah Makainai, and that the same is true to the best of his knowledge and belief.

FRED PATTERSON.

Subscribed and sworn to before me this 18th day of December, 1920.

T. E. M. OSORIO,

Notary Public, Fourth Circuit, Territory of Hawaii.

[Endorsed]: Filed at 10:30 o'clock A. M. December 18, 1920. (Sgd.) T. J. Ryan, Clerk. [16]

[Title of Court and Cause.]

Defendant's Answer.

Now comes Solomon K. Lalakea, the defendant above named, by W. H. Smith and W. S. Wise, his attorneys, and for answer unto plaintiff's complaint filed against him herein says that he,—

Denies specifically each and every allegation contained in the said complaint.

WHEREFORE defendant prays judgment for costs.

SOLOMON K. LALAKEA,
W. H. S.,
Defendant.

W. H. SMITH,
W. S. WISE,
Attys. for Deft.

[Endorsed]: Filed at 2:05 P. M., January 6, 1919. (Sgd.) Thomas Pedro, Jr., Clerk. [17]

[Title of Court and Cause.]

Motion to Set for Trial.

To the Honorable CLEMENT K. QUINN, Judge of the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Comes now the defendant above named by his attorneys, W. H. Smith and W. S. Wise, and moves this Honorable Court to set the said case

for hearing upon complaint and answer on a day certain in the month of September, 1919.

SOLOMON K. LALAKEA.

By (Signed) W. S. WISE.

By (Signed) W. H. SMITH.

To J. Lightfoot, Esquire, Attorney for Plaintiff,

Sir: Notice is hereby given that the foregoing motion will be presented to the Judge of the said court at his courtroom in Hilo, Hawaii, on Thursday, the 14th day of August, 1919, at 10 o'clock, A. M., or as soon thereafter as counsel may be heard.

(Signed) W. H. SMITH,
Attorney for Defendant.

[Endorsed]: L. No. 671. Doc. 3, pg. 92. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. January Term, 1919. Hannah Makainai, Plaintiff, vs. Solomon K. Lalakea, Defendant. Ejectment. Motion to Set for Trial. Filed at 11:51 o'clock A. M. Irma Patten, Asst. Clerk. W. H. Smith, W. H. Wise, Attorneys for Defendant. Filed at 11:51 o'clock A. M., Aug. 12, 1919. Sgd.—Irma Patten, Asst. Clerk. [18]

[Title of Court and Cause.]

Motion for Nonsuit.

Comes now Solomon K. Lalakea, the defendant above named, by his attorneys, W. S. Wise and W. H. Smith, and moves this Honorable Court for

a judgment of nonsuit herein upon the following grounds:

I. That the plaintiff has not presented any evidence herein in support of her declaration.

II. That the plaintiff has not introduced evidence sufficient to entitle her to a judgment by the Court in her favor.

III. That the plaintiff has failed to sustain all the necessary allegations in her declaration.

This motion is based upon all the pleadings, paper, and files herein and upon the evidence introduced by the said plaintiff.

SOLOMON K. LALAKEA.

By W. H. SMITH,

W. S. WISE,

His Attorneys.

[Endorsed]: Filed at 9:55 o'clock A. M., January 27, 1921. Thomas Pedro, Jr., Clerk. [19]

[Title of Court and Cause.]

Motion for Continuance.

Comes now Solomon K. Lalakea, defendant herein, by his attorneys, Carlsmith & Rolph and W. S. Wise, and moves that the trial of said cause be continued for at least one week in order to enable counsel to prepare for the trial of said cause.

This motion is based upon the records and files in this cause, together with the affidavit hereto attached.

Dated at Hilo, Hawaii, June 28th, 1920.

SOLOMON K. LALAKEA.

By (Signed) CARLSMITH & ROLPH,

His Attorneys. [20]

Affidavit in Support of Motion.

Territory of Hawaii,

Fourth Judicial Circuit,—ss.

Carl S. Carlsmith, being first sworn, upon his oath says: That he is a member for the firm of Carlsmith & Rolph, attorneys at law, practicing in all the courts of this Territory, and that he is one of the attorneys for Solomon K. Lalakea in the case of Makainai vs. Lalakea, set for trial by the Circuit Judge of the Fourth Circuit at nine o'clock Monday, June 28th, 1920; that the other member of the firm of Carlsmith & Rolph is S. S. Rolph, Esq., who is now and for some time last past has absented himself from the office of the firm and is giving to The First Trust Company of Hilo, Limited, his undivided time and attention for the purpose of arranging the probate the real estate titles of the said Trust Company, and that he is attending to no other business confided to the said firm;

And this affiant further states that at about the hour of noon on Thursday, June 17th, 1920, Solomon K. Lalakea, defendant above named, came to this affiant and stated that upon that same day said Lalakea had been served with an order of the Circuit Court Judge of the Fourth Circuit to

show cause immediately why he should not file his final accounts in the Estate of T. K. Lalakea, Deceased, of which Solomon Lalakea was administrator, and why he should not pray for his final discharge as such administrator. Said Lalakea also stated to affiant that two actions at law in which the said Lalakea was a party, to wit, the action of Solomon K. Lalakea, Administrator of the Estate of T. K. Lalakea, Deceased, *versus* Sarah Todd, and the case of Makainai *versus* Lalakea, had been mentioned by the Judge as cases which would be set for early hearing. [21]

Said Lalakea stated to affiant that his attorney in the probate in the probate case and in the two actions at law was Mr. W. H. Smith, whom he had employed and to whom he had paid large fees both by the way of retainer and for services rendered, and that the said W. H. Smith had theretofore departed for the mainland and was at present in the State of Massachusetts. Said Lalakea requested affiant to appear in court at two o'clock of the same afternoon and there request the Court to grant sufficient time for the hearing of the said probate and law matters to enable said Lalakea to obtain the presence of his attorney, W. H. Smith.

Affiant thereupon made a hasty examination of the probate records in the said Estate of T. K. Lalakea, and upon the hasty examination became convinced that the pendency of certain litigation offered good cause why the administrator should not file his final accounts and pray for discharge. Affiant then drew a response to the order to show

cause, and at the hour when the Court convened appeared therein and presented the said response.

The proceedings in court required the presence of affiant during a greater portion of the afternoon and affiant succeeded in having the order to show cause continued until an indefinite day in the future, the Judge stating that the matter would be postponed until the hearing of the case of *Lalakea Administrator versus Todd*.

The Judge of the said court then ordered counsel to be prepared for the setting of the cases of *Lalakea versus Todd* and *Makainai versus Lalakea* at an early date. Thereupon affiant learned from Mr. Godbolt, who had recently theretofore been appointed master to examine all of the accounts of the administrator during the period of more than four years of his administration, that affiant was requested to appear before the said master and present evidence sustaining certain of the accounts of the said administrator as the same appeared in the Probate Court. [22].

The master then informed affiant that from the evidence contained in the record certain items of expenditure by the administrator would necessarily be recommended surcharged. This affiant discovered that the said items, if surcharged against the administrator, would total somewhere between \$6,000 and \$10,000, and affiant requested the said master to postpone the examination and hearing until affiant could become acquainted with some of the details involved in said accounts. Thereupon affiant immediately began a careful ex-

amination of the administrator's attorneys, and also the administrator.

That affiant worked during the regular office hours of Friday and Saturday and to a late hour on Friday night in preparation of those accounts, and appeared before the master during the court hours of one entire day offering evidence in support of the said accounts. At the *same this* affiant attempted to make an examination of the records and files and memoranda of evidence of the said W. H. Smith in connection with the said case of *Lalakea versus Todd* in order to present the same before the Circuit Court, and devoted thereto his entire time on Sunday, June 19th, 1920, and during the evening of that day, and during all of the following Monday.

That the said action of *Lalakea versus Todd* involved a contest upon the payment of a promissory note for \$1,621.65, executed by Sarah Todd; that the answer on file set up as a defense want of consideration for the said note, misrepresentations and fraud on the part of the payee, and that in preparation for the trial of said cause this affiant was obliged to anticipate both questions of law and fact and expended all of his available time during the days and nights of Sunday and Monday in the preparation thereof, as well as the morning hours before the convening of court on Tuesday, June 22d, on which day the cause went to trial. The trial of the said cause required the entire day of Tuesday and a portion of the day following, and upon Thursday, June 24th, the argument on the

law and the facts was entered into by counsel and not completed until about the hour of noon. [23]

That before the said 24th day of June this affiant was almost constantly engaged in acquainting himself with the voluminous records in the said probate case and the books of account, documents and receipts in the said cause of Lalakea *versus* Todd, and that it was practically impossible for him to investigate the records, evidence and legal questions in the case of Makainai *versus* Lalakea. That prior to said date this affiant had no knowledge whatever of the facts or legal principles involved and has been obliged to gather the same almost exclusively from the records and memoranda left by the said W. H. Smith in his office and from the facts which can be obtained from W. S. Wise and the said Lalakea. That from these facts this affiant now learns that the action involves property worth in the neighborhood of \$400,000.00, and that the principal questions of law involved, so far as this affiant is able to understand them, are connected with the execution of a deed wherein T. K. Lalakea is grantor and Solomon Lalakea is grantee, it being charged that the grantor failed to execute the same and failed to deliver the same, with the result that the deed, now recorded, is invalid. That the said cause was set for trial some months ago and a portion of the evidence submitted when the plaintiff rested, a motion for a nonsuit was overruled and the cause transferred to the Supreme Court upon certain questions of law then pending. That it now becomes necessary to offer

the defendant's evidence in rebuttal of the plaintiff's evidence in order to sustain the defendant's contention that the deed in question has been executed by the said T. K. Lalakea and was by him delivered to the said defendant. That this affiant has been able to read through the transcript of testimony before made, but insufficiently to enable affiant to make the proper preparation for the presentation of the defendant's case. That this affiant has used all available hours during the day and night for the examination of the records, notes and *and* memoranda of evidence and other documents pertaining to the said cause when not engaged in the actual trial or the preparation of the said [24] probate case and the said case of Lalakea *versus* Todd, and that the time afforded to his affiant and the opportunity to examine witnesses, to prepare briefs and otherwise to make sufficient or adequate preparation of the defense of the cause *have entirely* insufficient, and that if the said cause shall proceed to trial on Monday, June 28th, 1920, at nine o'clock A. M. at which time it has been set by the order of the Circuit Judge, the said defendant will be unable, by reason of the lack of preparation of his counsel, to fairly, fully and adequately present his defense.

And this affiant further says that the said W. H. Smith, who has been for several years last past the principal attorney for said Lalakea, departed for San Francisco at some time during the month of May last, and at about the time of his departure entered into conversation with this affiant relative

to court proceedings which might involve his causes then pending, and stated to this affiant that the Circuit Judge of the Fourth Circuit was then incapacitated by illness from which he had been suffering since February of this year, and was absent in Honolulu, and it was his belief that the said Judge would be unable to return to his official duties at any time before the first of July, at which time the causes pending in the Fourth Circuit Court are not triable, and said W. H. Smith stated to this affiant that he believed that no causes could be heard until his return from the mainland in the month of September following. That it is impossible to communicate with the said W. H. Smith at the present time except by cablegram and it is impossible to obtain his presence in court and to try the said cause at the time set.

That this affiant has examined the files and office dockets of the said W. H. Smith in an endeavor to obtain the results of the preparation which has been made in this cause, but the notes and memoranda left by the said W. H. Smith are so fragmentary as to be of slight assistance in the preparation of the case, and that this affiant will require at least one week of preparation to become sufficiently acquainted with the questions of fact and law in the case to enable him to safely proceed to trial. [25]

That W. S. Wise, who has appeared as one of the attorneys for said Lalakea in the three matters referred to, has stated to this affiant that he has made no preparation for the trial of the said cause

except to furnish the said W. H. Smith with some facts and data relative to the estate and that the said W. H. Smith has made all of the preparation for the trial of this cause to date, and that said W. S. Wise has made no such preparation whatever. That the said W. S. Wise is a man advanced in years, of poor health and that he is now and for some time past has been so deaf that he has undertaken no contested litigation in the Circuit Court of the Fourth Circuit. That the last contested case in which he appeared was a criminal case in which he was appointed by the Court to defend, and said case was tried two years ago. That said W. S. Wise, by reason of his physical infirmity and by reason of his lack of knowledge of the law and facts involved will be of no considerable assistance to this affiant in the hearing of the said cause, and that this affiant will be compelled to proceed to trial upon his own preparation.

And this affiant further states that from the slight examination which he has made of the said cause and the evidence in support of the defendant's contention he is of the opinion that the defendant has a good and meritorious defense to the action now pending if such defense can be properly presented; that this affiant does not make this affidavit for the purpose of obtaining any continuance for any other reason than the inability of this affiant to fairly, adequately and fully present the defense of the said defendant; that this affiant has filed the said motion for continuance in good faith and solely for the purpose of obtaining an oppor-

tunity to properly defend said defendant and not with the intention of harassing, embarrassing or taking any unfair advantage of the plaintiff or any other person connected with the said cause; that if this affiant is given the opportunity, within the course of one week's time he will be able to make full and adequate preparation and to present the said [26] cause on behalf of the defendant, and that this affiant does not know of any attorney or party connected with the defendant who has or is attempting to obtain a continuance of this matter for any purpose other than those hereinbefore set forth; that if the said cause is continued, said defendant will promptly go to trial at the time when the matter is set after affiant has sufficiently prepared the cause.

And further affiant saith not.

(S.) CARL S. CARLSMITH.

Subscribed and sworn to before me this 28th day of June, A. D. 1920.

[Seal]

THOMAS PEDRO, Jr.,
Clerk.

[Endorsed]: Filed at 9:10 o'clock A. M., June 28, 1920. Thomas Pedro, Jr., Clerk. [27]

[Title of Court and Cause.]

Stipulation of Parties.

It is hereby stipulated and agreed by and between the parties hereto that if the Court shall render judgment in the plaintiff's favor for the

land described in her declaration then it shall be taken by the Court that there is evidence tending to show that the damages and mesne profits to which the plaintiff would be entitled to upon final recovery of judgment is the sum of \$1,575.00 and that there is no evidence tending to show any other sum.

Dated at Hilo, Hawaii, Dec. 11, 1920.

RUSSELL & PATTERSON,

By J. W. RUSSELL,

Plaintiff's Attorneys.

CARLSMITH & ROLPH,

Defendant's Attorneys.

The foregoing stipulation is approved.

CLEMENT K. QUINN,

Judge Circuit Court, 4th Judicial Circuit, T. H.

[Endorsed]: Filed at 11 o'clock A. M., December 13, 1920. (Sgd.) T. J. Ryan, Clerk. [28]

[Title of Court and Cause.]

Decision.

This is an action in ejectment by Hannah Makainai against her brother Solomon K. Lalakea to recover from him the land described in her complaint and damages for its retention.

The defendant answered by general denial and the cause came on to trial jury waived.

At the beginning of the trial and before any evidence was introduced a stipulation was entered into by the parties in open court as to certain facts

which were stated by the attorney for the defendant in substantially the following language:

We admit that T. K. Lalakea mentioned in the declaration was in his lifetime and prior to the execution or alleged execution [29] or prior to the date of a certain deed dated March 6, 1915, which will be offered in evidence by defendant, seized of the pieces of land named in the declaration; that T. K. Lalakea died intestate on the 7th day of May, 1915; that Hannah Makainai was an heir at law of T. K. Lalakea, deceased.

These stipulations are subject to an agreement by counsel that we may offer in evidence, and that there will be no objection to accepting in evidence a certain deed purporting to be executed by T. K. Lalakea to Solomon K. Lalakea, bearing date March 6, 1915, and, according to the office of the Registrar of Conveyances in Honolulu, entered upon the 11th day of May, 1915, in Liber 428, pages 122-127; and that that deed shall be considered by them as constituting a *prima facie* case upon the part of the defendant.

This statement of the stipulation was agreed to by the attorney for the plaintiff with the further statement that the stipulation should contain the fact that the defendant is in possession of the land, which was agreed to by the attorney for the defendant. With this stipulation the plaintiff rested and with the introduction of evidence of the deed referred to defendant also rested. The plaintiff thereupon introduces certain evidence for the purpose of rebutting the validity of the deed intro-

duced in evidence by the defendant, the evidence offered being directed to the questions of whether or not the deed in question was ever delivered to the defendant by T. K. Lalakea in his lifetime, and whether or not the signature to said deed was in fact the signature of said T. K. Lalakea. [30]

It was then further stipulated that if the plaintiff is entitled to recover she is entitled to an undivided one-eighth interest in the land in question. Plaintiff having introduced her evidence on these issues again rested and the defendant moved for a nonsuit upon the following grounds:

(1) That the plaintiff has not presented any evidence herein in support of her declaration;

(2) That the plaintiff has not introduced evidence sufficient to entitle her to a judgment by this court in her favor;

(3) That the plaintiff has failed to sustain all the necessary allegations in her declaration;

The motion for a nonsuit was overruled, to which ruling an exception was taken by counsel for the defendant. Defendant was thereupon at his request granted an interlocutory bill of exceptions, which bill of exceptions were overruled by the Supreme Court.

“The deed mentioned in the stipulation and introduced in evidence by defendant bears date of March 6, 1915. It purports to have been executed by T. K. Lalakea and is witnessed by D. Namahoe, and Solomon K. Lalakea the grantee therein named. This deed was not proven for record in the lifetime of the grantor but on May 8, 1915, the

day following the grantor's death, the subscribing witnesses appeared before the Circuit Judge at Hilo, produced said deed and made proof of its execution in the manner required by the statute. With the Circuit Judge's certificate of proof attached said deed was immediately forwarded by the defendant [31] to Honolulu to the Registrar of Conveyances and entered of record on May 11, as stated in the stipulation." To begin with, in December, 1914, T. K. Lalakea had his attorney, Mr. O. T. Shipman, draft about half a dozen deeds among which was the deed in question, the other deeds were to various other of his children and if all had been executed and delivered would have disposed of all, or practically all, of his large and valuable estate. By far the greater part of his valuable lands were included in the deed to his son, Solomon, the defendant herein.

Mr. Shipman was at that time, and had been for a period of four or more years the regular legal advisor of Lalakea, Senior, and was a notary public. Lalakea habitually went to Mr. Shipman to have his conveyancing done and to have his acknowledgments taken. It appears that after drafting these deeds Mr. Shipman delivered them to his client and at various times thereafter had conversations with him about the execution thereof, the last of which was about April 20, 1915. It is significant that one of these conversations took place on the 6th day of March, the very day that the deeds purport to have been executed. What these conversations were the witness was not permitted to say. One of the other

deeds drawn by Mr. Shipman at the same time he drew the deed in question was to the plaintiff and two of her sisters jointly. It is admitted that this deed was not delivered to the plaintiff personally by her father, but like the deed in question was proven for record by the same subscribing witnesses before the Circuit Judge on the day following the death of the grantor, and by the defendant sent to Honolulu for record.

One of the other grantees named in the deed to the plaintiff has also testified that it was never delivered to her but that some [32] two years after it was recorded was sent to her by defendant.

Mr. Shipman has testified that about ten minutes before he heard of the death of Lalakea, Senior, the defendant came to his office "in a big fuss and wanted me to go right over to Lalakea's residence, stating that he was in pilikia, in a bad way, and wanted me to go over right away and go over to see about these deeds—these half a dozen deeds I had originally drafted and delivered to T. K. Lalakea. I asked him if Mr. Lalakea was conscious to know what he was doing. He did not think he was. Solomon didn't think he was really conscious. I said it is no use for me to go, I could not do anything for you. It is too late." Mr. Shipman was unable to state whether the defendant stated that he wanted him to have the old man sign and take his acknowledgment or simply to take his acknowledgment, but he states positively that he wanted acknowledgments taken in connection with the deeds mentioned. It also appears from the evidence of

the plaintiff and her sister Mrs. Hewahewa that within one hour after the death of their father the defendant went into the room of their father's residence formally occupied by him, unlocked the drawers of his bureau and took therefrom a bundle of papers, wrapped them in a towel and left the house. They state in effect that this bureau was at all times kept locked by their father in his lifetime and in it he kept his papers, money, etc.; for a short time prior to their father's death their brother Solomon had been looking after their father's business and during that time carried the key to said bureau but that he (Solomon) kept his papers in another room in a writing-desk. They did not attempt to say that the papers [33] taken from the bureau by Solomon at this time included the deed in question, but they both described the papers as being part white and part blue, which description corresponds with the deeds to the defendant and various other children, three of which are exhibits in this case.

Then we have the further fact that on the day following the death of their father the son Solomon produced the deed to himself and the deeds to the other children before the Circuit Judge and had them proved for record and sent them to the Registrar of Conveyances for record without consulting any of the other grantees who have so far testified in this case. In addition to this line of testimony showing the actions of the defendant just before and just after his father's death three witnesses who knew the deceased well for a number of years before

his death and who were familiar with his signature have testified just as positively as any witness could who gives his opinion that in their opinion the signature to the deed relied upon by the defendant is not the signature of T. K. Lalakea. These witnesses were thoroughly cross-examined on this branch of their testimony and each supported his opinion by as good reasons as could be expected in a matter of this kind. There were also produced several admitted genuine signatures of T. K. Lalakea which the witnesses compared with the signature of the defendant's deed and pointed out points of difference. The Circuit Judge was also at liberty to make his own comparisons between the genuine signatures and the signature to the deed in question.

At the time of the above mentioned "several admitted genuine [34] signatures of T. K. Lalakea" W. H. Smith, counsel for Solomon Lalakea, informed the Court that he would swamp the court when the defense put on its case with other genuine signatures of T. K. Lalakea, signatures, made by T. K. Lalakea while he was Treasurer of the County of Hawaii and thereby prove to the Court that the signature to the deed of March 6, 1915, was and is the genuine signature of T. K. Lalakea.

"We are then called upon to determine whether the testimony in this case does more than create a mere surmise or suspicion that T. K. Lalakea never delivered the deed in question to the defendant. We think that it does. It shows clearly that within a few minutes of the death of his father the defendant was seeking the aid of an attorney and notary

public to have the deed acknowledged by his father; that within a very short time after his father's death he went into the room occupied by his father prior to his death and took therefrom papers which it might be inferred included the deed in question; it also shows that several other deeds were made by the same grantor at the same time, under the same circumstances, conveying other property to the defendant's brothers and sisters and that these deeds, or at least some of them, were never delivered. The evidence as to the genuineness of the grantor's signature is not without bearing upon this issue. If as might be found from the evidence of the three witnesses to which we have referred the deed was never executed by T. K. Lalakea this fact would have a strong bearing upon the question of the delivery or nondelivery of the deed." [35]

On June 17, 1920, this case was placed on the calendar of the court for the purpose of setting the same for trial at an early date and the Court intimated to counsel that the case would be tried during the month of June and according to the minutes of the Court Mr. Wise stated, "if this case is to be set for trial at least have it set for the early part of the coming week."

The Court made the following order, "Law No. 671, Hannah Maikainai vs. Solomon K. Lalakea, will be set for trial to-morrow morning at ten o'clock." This order was made at the morning session. At the afternoon session of June 17, Mr. Carlsmith appeared in court and formally entered

of record the name of Carlsmith & Rolph as attorneys for Solomon K. Lalakea.

On June 28, 1920, Carlsmith & Rolph filed a motion for a continuance for one week, which motion for a continuance was predicated upon an affidavit signed by Mr. Carlsmith.

If the motion was granted it would have meant a continuance of this case until September 1, 1920, as the statute prohibits the trial of a case of this nature during July and August.

The statute does not read, "No trial shall be begun," but "no trial shall be had, etc."

Testimony taken on the motion attempted to convey the impression to the Court that W. S. Wise would be of no assistance to associate counsel by reason of his deafness and Judge Wise demonstrated to the Court beyond the shadow of a doubt that his hearing is splendid.

Mr. Wise has been counsel for defendant from the inception of this case and took an active part at the time plaintiff presented her evidence. [36]

Mr. Wise has been an active practitioner before the present Judge for the past four years. Mentally and physically his powers are unimpaired. He demonstrated in open court that his hearing is good and he has been engaged in the active practice of his profession prior to and subsequent to this trial.

The motion for a continuance was without merit.

Daniel Namahoe was called as a witness on behalf of defendant and testified substantially as follows: That on March 6, 1915, while he was at his work as

fish inspector he was visited by Solomon Lalakea, who requested him to go to his father's house—this was between 11 A. M. and 12 M.—witness arrived at Lalakea Senior's home in Hilo and was requested to be present and witness Lalakea Senior's signature to various partition deeds. Witness saw Lalakea Senior with the assistance of Solomon K. Lalakea affix his signature to Plaintiff's Exhibit "A" and other deeds. Thereafter witness affixed his signature to Exhibit "A" and saw Solomon Lalakea do likewise. That Lalakea Senior was sick and weak and unable to write his name without assistance. Thereafter Lalakea Senior in the presence of witness gave the papers to Solomon K. Lalakea instructing him to "take good care of these papers, when I pass away have them probated then give each their share." The foregoing took about a half an hour then witness returned to his work.

Solomon Lalakea was then called and testified that on March 6, 1915, after bringing Daniel Namahoe to his father's house he found his father seated at a table in the dining-room. Lalakea Senior told Namahoe to sit down and told him he wanted him as a [37] witness to sign papers. The deeds were then procured and Lalakea Senior started to write his name but was unable to make his mark on exhibit "A" as well as the other deeds and Solomon testified, "He wanted me to come and hold his hand so he could write his name. I did as he requested me to do," and he assisted his father in signing all the deeds then Lalakea Senior passed the deeds including exhibit "A" to Solomon Lalakea and told

Solomon K. Lalakea "he said to hold the deeds until he passed away and then have them acknowledged." Solomon Lalakea then took the deeds and put them inside a shoe box inside a little tin and had possession of the deeds until his father died.

FACTS AS FOUND BY THE COURT.

In December, 1914, T. K. Lalakea had his attorney, Mr. O. T. Shipman draft about a half a dozen deeds among which was the deed in question, Plaintiff's Exhibit "A." The other deeds were to various other of his children and if all had been executed and delivered would have disposed of all, or practically all of his large and valuable estate. By far the greater part of his valuable lands were included in the deed to his son Solomon, the defendant herein. Mr. Shipman was at that time and had been for a period of four or more years the regular legal advisor of Lalakea, Senior, and was a notary public. Lalakea habitually went to Mr. Shipman to have his conveyancing done and to have his acknowledgments taken. It appears that after drafting these deeds Mr. Shipman delivered them to his client and at various times thereafter had conversation with him about the execution thereof, the last of which was about April 20, 1915. [38]

It is mighty significant to my mind that one of these conversations took place on the 6th of March about 4 P. M. just before Mr. Shipman boarded the steamer on his way to Honolulu. It appears that on the last-mentioned date Mr. Shipman was in need of some money to pay his expenses in traveling to Honolulu and as Lalakea, Senior, was indebted to

him he called to collect, the same. There can be no doubt as to the date for the reason Mr. Shipman left on the "Matsonia" and was present Monday morning in Honolulu, March 8, 1915, at a meeting of the Board of Equalization. He found Lalakea, Senior, in a normal condition able to do business and had transacted business that morning. Lalakea Senior at this meeting complained to Mr. Shipman of swollen feet. Mr. Shipman observed the condition of his hands and found them to be "no more shakier than what his condition had been."

On March 20, 1915, Lalakea, Senior, made a lease, Plaintiff's Exhibit "C" to part of the land described in Plaintiff's Exhibit "A." He attached his signature to this lease in the presence of O. T. Shipman, unaided and unassisted and the signature is in a fairly legible hand and it is the best evidence as to Lalakea Senior's physical condition fourteen days after the alleged execution of Plaintiff's Exhibit "A."

When Daniel Namahoe and Solomon K. Lalakea testified in this court that on the 6th day of March, 1915, Daniel Namahoe witnessed the signature of Thomas K. Lalakea to exhibit "A," and when Solomon K. Lalakea testified that on the 6th day of March, 1915, he assisted his father in the execution of exhibit "A," both of them gave testimony which this Court is unable to believe. Thomas K. Lalakea at no time executed or delivered the deeds alleged to have been executed by him on March 6, 1915. [39]

Daniel Namahoe is that type of a witness which is familiar to old practitioners in Hawaii—that type of witness which is on hand supplying the missing link in adverse possession cases—that type of witness which furnishes or strengthens the family tree in land cases—he was far from being calm, cool and deliberate and gave the Court the impression witness did not believe that the Court believed the witness was telling the truth—he carried with him the atmosphere of a coached witness who breathed perjury and the witness seemed to realize the last few minutes he was on the stand that he made a fatal mistake in presenting himself as a witness in this case.

I have heard Solomon K. Lalakea testify on various occasions and when Solomon is telling the truth he makes a very good witness he is calm, cool and deliberate and is hard to confuse but when he took the stand in this case and during the whole of his testimony the muscles of his face were constantly twitching. He was endeavoring to knot the fingers of his hands and tie his legs to the witness chair. His eyes were wild and rolling and he perjured himself in every material statement wherein he attempted to corroborate the statements of Daniel Namahoe as to the execution of the deeds.

I have been around court for a good many years but I have never heard two witnesses testify that so indelibly impressed upon my mind the falsity of their statements.

Lalakea, Senior, was the owner of a vast estate. He had been executing deeds and leases for many

years and as late as March 20, 1915, he executed a lease to land which Solomon K. Lalakea claims was conveyed to him March 6, 1915. [40]

Thomas K. Lalakea would not have executed acts of ownership by executing a lease to land that he had conveyed fourteen days prior to Solomon.

If Lalakea, Senior, had executed and delivered (Plaintiff's Exhibit "A") this deed he would have been conscious of the fact that title to this property was in Solomon and Solomon would have joined as one of the lessors. When this point was under consideration at the trial defendant sought to explain that Lalakea, Senior, naturally executed the lease himself because of the reservation in the deed giving him a life interest in the property.

We must take into consideration this lease (Plaintiff's Exhibit "C") was for ten years and admittedly Lalakea Senior executed this deed in contemplation of death and when he realized that he had but a short time to live. At any rate in view of the deed of this property, without taking into consideration the reservations, naturally there would have been a question in his mind as to his right to execute such a lease and some inquiry would have been made by him in this regard bearing in mind also that his attorney of many years took the acknowledgment to this lease, but Solomon's testimony is, his father executed this lease as a matter of course as he had been in the habit of doing previously. When this lease was executed it shows that at the time of the execution of the deed Lalakea, Senior, was not in that feeble and weak

condition which would necessitate assistance in the signing of his name. When he signed this lease he was two weeks nearer death than the day he is alleged to have signed the deed and there is no doubt but what he was a sick man at that time but [41] all the witnesses readily recognized the signature to the lease as being the natural and usual handwriting of Lalakea, Senior. Solomon K. Lalakea's signature is in evidence. This court is at liberty to make comparisons. The lease (Plaintiff's Exhibit "C") was written by Solomon K. Lalakea. Solomon would not have made out this lease for his father to execute if fourteen days prior Lalakea, Senior, had executed the deed in question—at least he would have consulted Mr. O. T. Shipman as to whether this ten year lease should have been executed by his father without Solomon joining as one of the lessors. This fact taken in connection with the fact that Mr. Shipman saw Lalakea Senior about four P. M. March 6, the day of the alleged execution of this deed, he was well enough to talk business with Mr. Shipman at that time and paid him a fee. But according to Solomon's testimony his father just four hours previously was so feeble as to be unable to subscribe his name unassisted. If Lalakea, Senior, was in the condition testified to by Solomon, Shipman would have readily noticed this shaky condition of the hands for in the payment of money, the taking of the same either from his pocket or from a drawer and passing it to Shipman, Shipman would have readily recognized the condition which Solomon says he was in.

Defendant's counsel W. H. Smith made one of the greatest tactical blunders when he perfected his interlocutory bill of exceptions after the Trial Court denied the motion for a nonsuit.

Plaintiff's case was strengthened rather than weakened by the evidence introduced by the defendant. When the handwriting witnesses were on the stand during the plaintiff's presentation of her case *there* [42] testimony was subjected to rigid cross-examination by Mr. Smith counsel for defendant and he left no stone unturned to discredit the testimony of witnesses Shipman, Patten and Marriner. Bearing in mind that W. H. Smith informed the Court he would swamp the Court with evidence of Lalakea's signatures while he was a County official and prove conclusively to the Court that the signature attached in question was a genuine signature of Lalakea Senior.

Now, if the defendant and his counsel, W. H. Smith, at the time of the presentation of plaintiff's case intended to rely on the defense which was subsequently put forth they would have admitted in open court that the deed was executed in the manner that they now claim it was and would not have attempted to trifle with the Court and subject plaintiff's witnesses to the long and rigid examination which they were subjected to. If at the time of the trial of plaintiff's case the defendant was conscious of the manner in which these signatures were made and had at that time intended to prove these signatures as later testified to, they

would have joined in the evidence to prove the dissimilarity.

When Shipman was called to the stand and questioned concerning the handwriting defendant's attorney sought to obtain the right to cross-examine witness upon this point before he was allowed to answer. It is beyond belief that if they knew the signatures were really the results of the guidance of Solomon's hand, the defendant should have insisted upon a thorough cross-examination of witness Shipman to determine the full extent of Shipman's familiarity with Lalakea Senior's handwriting, before he would permit him to testify to what later in the case they admitted [43] with respect to the dissimilarity of these signatures. Defendant's counsel would not have exerted as great effort as they did on the cross-examination of the plaintiff's witnesses in the production of a number of other signatures of handwriting in their attempt to show that these witnesses were not infallible in their judgment as to these disputed signatures.

If defendant and his counsel at the time of the trial of plaintiff's case knew that they were to rely upon the proof that these signatures were in fact the signatures of Solomon Lalakea made while he held the hand of his father, counsel would not have been so keenly interested in the cross-examination of Shipman to obtain his views from the "starting point" and "finishing point" of the different letters and it would not have made any difference to them whether certain signatures testi-

fied to by Shipman were written in 1905 or 1912 or 1915.

Take the cross-examination of Patten in which they sought to have him analyze the letters "t," "k," "i" and they wanted Patten's opinion as to the disputed signatures from his mental picture of Lalakea, Senior's, signature.

It is significant that the defendant did not see fit to divulge in the manner in which the deed in question was executed until after the proof had shown conclusively that the alleged signature was not genuine and not until after the Supreme Court had ruled on the sufficiency of the evidence and it was not until he knew that the defense which he was relying upon could not be believed. [44]

It is asking too much of this Court to believe from the foregoing circumstances, that the defendant was relying on this line of defense at the time when Smith was cross-examining the plaintiff's witnesses.

Were defendant and his counsel familiar with the decision in 30 N. J. E. 193 at the time of the presentation of plaintiff's case? The following is taken from the decision of the Supreme Court: "The Vice-Chancellor's decision is particularly relied upon for the contention of the defendant that the proof that the signature is not T. K. Lalakea's does not join an issue as to the execution of the deed in question because, as he says, the deed could have been signed by the hand of a third party at the request of the grantor, and still have been his free act and deed."

Were they inspired in putting on their defense by the above?

Their attitude entirely changed as to the defense between January 28, 1920, the date of the decision of the trial court overruling the motion for a nonsuit and May 28, 1920, when they put in their defense.

No explanation was offered or attempted as to why Namahoe was sent for by T. K. Lalakea to witness his signature. The fact that O. T. Shipman drew these instruments and the further fact that it seemed to have been the desire on the part of T. K. Lalakea to keep the existence of these papers unknown to the other members of his family, would naturally suggest to the Court that if on March, 6, 1915, he wished these deeds to be executed, he would have sent for O. T. Shipman instead of [45] calling in an additional person. It would have been more logical for him to have sent for Mr. Shipman, as Lalakea knew that he was a notary public and could take his acknowledgment. If for any reason he purposely did not wish the deeds acknowledged, although it is inconceivable that he should have been suddenly possessed with the peculiar desire to have this deed executed and witnessed but not acknowledged. Furthermore, Mr. Shipman's office, where Lalakea knew he could have found him, was on the same street where Lalakea lived and within two short blocks of his house. If it was his purpose not to have the deed acknowledged, then it would indicate that there was no particular eagerness on his part to

execute the deeds, in which event he would not have gone to the pains of having Namahoe go to the trouble of leaving his work during the day-time for the purpose of appearing at Lalakea's home to witness the signature. The whole situation as related by Lalakea in this respect seems very unreasonable and borders on absurdity.

Other circumstances that help to the conclusion that T. K. Lalakea never signed these deeds are those that are connected with Solomon's conduct at the time of his father's death. Solomon would have the Court believe that although he had in his possession a signed deed by his father of this vast amount of property for several weeks, the latter part of which time he realized his father was failing and nearing his end, he nevertheless did absolutely nothing toward having the execution of the deed perfected so as to become effective, as he believed. It will be recalled that he testified that he did not know whether or not the deed was valid because of the fact that it lacked this [46] acknowledgment. But just as soon as he knew the end of his father's life had arrived, and even before his father's body had grown cold, he was desperate in his efforts to obtain a notary public to falsely affix a notarial certificate to his deed. It certainly cannot be contended that he refrained from calling in a notary before his father's death to have his father's acknowledgment taken, because of any scruples that he might have had with respect to his father's wishes and suggestion to wait until his death before doing anything with these deeds.

His conduct immediately after his father's death would certainly not preclude any idea that Solomon would have at least made some effort to having these deeds acknowledged before his father died. The cruelty of Solomon's demeanor and conduct would suggest to the Court that the deeds had not been acknowledged, particularly as Solomon knew that Mr. Shipman had drawn these deeds.

If the deed in question had been in fact signed, as Solomon testified, several weeks before the death of his father, he would have had sufficient time in the consideration of the matter to have learned and known that an acknowledgment was not necessary to give validity to the deed, and he would not have been so desperate in his efforts to effect an acknowledgment. It will be recalled that Solomon claimed that at the time he sought to have Shipman take the acknowledgment, he did not know whether or not the deed was good without such an acknowledgment. His excited desperation upon that occasion was such as to convince the Court that had this deed been in his possession for weeks, he would not have been so indifferent to the importance to him of this [47] instrument as not to have known and learned by the time of his father's death that a deed was good even though not acknowledged. These circumstances point to the fact that whoever signed these deeds, **THEY WERE SIGNED THE SAME DAY THAT T. K. LALAKEA DIED.**

Another matter that has vital bearing on the issue as to whether or not the alleged deeds were

ever executed by the deceased is the fact that from the date of the alleged execution up to the time of his death, more than two months thereafter, he never at any time told Mrs. Makainai or Mrs. Hewahewa anything about the execution of the same, and never informed them as to the share of the property that they were to receive, notwithstanding the fact that during most all of this time the two daughters were residing in the house with the deceased and defendant.

Another circumstance that seems very remarkable is the peculiar claim made by both Solomon and Namahoe that at the time of the execution of these deeds that Mrs. Makainai who lived there at the house, did not come into the room at the time, these deeds were being executed, although the three of them, Mr. T. K. Lalakea, Solomon and Namahoe were there about half an hour; neither is it claimed that this particular time was fixed because of the absence of Mrs. Makainai, as Solomon testified he believed she was somewhere around the house, yet Solomon admits that he never told Mrs. Makainai anything as to what had been done. [48]

THIS CASE WAS TRIED BY PLAINTIFF
UPON THE THEORY:

1.

THAT THE DEED IN QUESTION IS A
FORGERY.

2.

ASSUMING THE ALLEGED DEED TO HAVE
BEEN EXECUTED THERE WAS NO DE-
LIVERY SUFFICIENT TO PASS TITLE.

3.

THE INSTRUMENT IN QUESTION IS A
TESTAMENTARY DISPOSITION OF THE
PROPERTY THEREIN DESCRIBED AND
IS VOID AS A DEED.

The Court has found relative to the first contention that the deed is a forgery and consequently it would not be necessary to pass upon the other two questions but the Court feels that its duty is to pass upon the other two questions presented. This Court in discussing the two latter questions will indulge in the violent presumption that it believed the testimony of Solomon and Namahoe for the purpose of passing upon the two latter questions.

All of the circumstances attending the defendant's attempts to have the deed acknowledged immediately before the death of his father when he knew that same could not have been acknowledged without the commission of a malfeasance in office by a notary public, his desperate efforts to obtain false certificates by a notary, his unseemly haste in procuring the acknowledgment before Judge Parsons and all his other suspicious acts, while pertinent upon the question as to the execution of the deed and while very relevant to and very strong proof in support of the contention that the deed had in fact never been signed, [49] are particularly pertinent to and more closely connected with the issue of delivery, and upon the considerations alone this Court would be justified in finding that there was no delivery.

In addition to these facts as bearing upon the question of delivery, the Court finds that this deed together with the other deeds that had been prepared by Mr. Shipman, were still in the possession of the alleged grantor after his death. The defendant took these deeds from the bureau which was the private bureau of the deceased and in which the other papers of T. K. Lalakea had been kept.

“In ejectment between heirs involving the question of delivery of deeds by decedent to plaintiff, the defense could show that the day decedent died plaintiff took a package of papers from decedent’s trunk and placed them in her bosom.”

Napier vs. Elliot, 44 So. 552.

It is true that the defendant contends that he kept them in a shoe-box on the shelf as his own private papers but the Court does not believe this contention.

I believe the testimony of plaintiff and her witnesses.

A circumstance of considerable importance is the fact that there was no delivery of the deed to Mrs. Makainai and Mrs. Hewahewa. The significance of this fact is twofold, first, from the fact that there was no delivery of the deeds to Mrs. Hewahewa and Mrs. Makainai, an inference could be drawn that the deed to the defendant, alleged to have been executed simultaneously with and under the same circumstances as the other deeds, was like-

wise never delivered; and secondly, the fact [50] that Mrs. Hewahewa's deed and Mrs. Makainai's deed were retained until after the death of the alleged grantor, shows that it was the intention of T. K. Lalakea to treat the deed of Solomon exactly as he had the other deeds and that it was his wish to keep possession of these deeds and retain them in his control until after his death.

“As a circumstance bearing upon the question of intention as to the delivery of the deed it was competent for the defendants to show that at the time of the making of the deed, and contemporaneous therewith, the grantor made two other deeds to Waldron and Hughes embracing all of the land the grantor had left after the deeds to plaintiff and her mother, and the further fact that the deeds to Waldron and Hughes were never delivered.

Napier vs. Elliot (Ala.), 50 So. 148.

The general rule of law is, the burden of proof of delivery of a deed is on the party asserting the due execution and delivery thereof.

“Where the delivery of a deed is placed in issue the burden of proof rests upon the party asserting its delivery.”

18 C. J. 413.

“The delivery of a deed being one of the necessary elements in so passing a title to real estate, the burden of proving delivery is upon the person claiming under it.”

Shaffner vs. Voss, 93 N. E. 235. (Ind.)

Burkholder vs. Casad, 47 Ind. 418.

“A deed takes effect only from the time of its delivery. Without delivery of a deed it is void. No title will pass without delivery. It is for the party claiming under a deed to prove its delivery—no legal presumption arises from the mere fact that the instrument is signed.”

Boyd vs. Slayback, 63 Cal. 493. [51]

The general requisites of a delivery are essential to the validity of a deed, are set forth in the following causes.

In *Renehan vs. McAvoy*, 38 L. R. A. (N. S.) 941, the following appears:

“It is quite clear upon the authorities that delivery and acceptance is essential to the validity of every deed, and what constitutes a sufficient delivery, to transfer and vest the title in the grantee, or to make it operative and effectual as a deed depends largely upon the facts and circumstances of each particular case. The general and essential requisites to the validity of a deed under the facts and circumstances as indicated in this case have been settled by numerous and well-considered authorities. In *Duer vs. James*, 42 Md. 496, affirmed by this court in *Hearn vs. Purnell*, 110 Md. 465, 72 Atl. 909, it is said, to constitute a delivery of a deed, the grantor must do some act putting it beyond his power to revoke. There can be no delivery so long as the deed is within his con-

trol, and subject to his authority. In the language of the Supreme Court in *Younge vs. Gilbeau*, 3 Wall. 636, 18 L. ed. 262m, the grantor must part with the possession of the deed or the right to retain it. In *Clark vs. Creswell*, 112 Md. 342, 76 Atl. 880, 21 Ann. Cas. 338, it was held there is a consummated delivery when the instrument has passed from the grantor without right of recall, to the grantee, or to some third person for his use.

“The test of delivery is the relinquishment by the grantor of the custody or the control of the deed. When he has formally executed and acknowledged it, and delivered it unconditionally to the grantee or one acting for him, the conveyance is completed and the title has passed.

“It is also settled by the great weight of authority in this state and in other jurisdictions that the grantor must part with all dominion and control over the deed at the time of its delivery to a third person, in order to make such act a sufficient delivery, in order to divest the title, and the delivery to the third person must be for the use and benefit of the grantee.” [52]

In *Wilson vs. Wilson*, 49 Am. St. Rep. 176, the Court in its opinion stated the following:

“The mere placing of the deed in the hands of one of the grantees did not, of itself, necessarily constitute a delivery. In such a case the inquiry is, What was the intention of the

parties at the time?—and that intention when ascertained, must govern; *Jorden vs. Davis*, 108 Ill. 336; *Bovee vs. Hinde*, 135 Ill. 137; *Oliver vs. Oliver*, 149 Ill. 542. . . . In other words, there was no intention at the time, to convey a present absolute title to the defendants, but the intention was that the deed should take effect at the grantor's death and vest the title in the defendants, provided he died without having recalled the deed. This was in no sense an attempt to deliver to the grantees in escrow, as contended by counsel for the defendants, but was merely a transfer of the possession of the deed to one of the grantees, the grantor at the time, however, reserving a future control over it. To constitute a delivery of a deed, it must clearly appear that it was the intention of the grantor that the deed should pass the title at the time, and that he should lose all control over it. A deed for an interest in the land must take effect upon its execution and delivery, or not at all. *Bovee vs. Hinde*, 135 Ill. 137; *Cline vs. Jones*, 111 Ill. 563; *Stincon vs. Anderson*, 96 Ill. 373."

In *Brown vs. Westerfield*, 53 Am. St. Rep. 532, the Court in reiterating the propositions above set forth, stated as follows:

"The matter of contest is, whether there was in law a delivery of the deed, for a delivery is indispensable to its binding effect. But, as was said by Chief Justice Lake in *Brittain vs.*

Work, 13 Neb. 347: 'No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.' Delivery of a written instrument like a deed is largely a question of intent, to be determined by the facts and circumstances of the case. In the case at bar, it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title to take effect presently. In other words, did Mrs. Brown part with control over the instrument and place the title in her daughter? If such was the purpose, the delivery was complete and the title to the property passed." [53]

The principles laid down in these cases that the test by which to determine whether or not there was a delivery of the deed in any particular case is whether or not the grantor by the circumstances attending the conveyance of the property involved, evinced an intention or transfer a present interest in the property and whether or not in doing so he parted with all dominion and control of his deed.

Bear in mind that both of these elements must be present in order to meet the requirements of a delivery. In fact, if either of these elements could be slighted, it could not be the element of intention as it might possibly be argued with some reason that the relinquishment of control and dominion of a

deed by a grantor could be considered as evidence of the intent to deliver, but the authorities are nevertheless in accord upon the proposition that the intent must be there and is the element that governs. Thus, the presence of an intent to effect a delivery unaccompanied by any act sufficient to cause the grantor to relinquish control and dominion of his deed so as to carry this intent into effect cannot be considered sufficient for a delivery. The necessity for the concurrence of these two elements is demonstrated by those cases that have repeatedly held that even the mere manual delivery of the deed to the grantee is not of itself sufficient to constitute a delivery in law. [54]

“Whether the deed was delivered so as to take effect as a present conveyance of the title must be determined from the words and acts of the parties in connection with the circumstances attending the transaction. The question is one of intention—whether the parties, at the time of the transaction in the saloon, intended that the deed should then take effect according to its terms.

“*The mere placing of a deed in the hands of a grantee does not constitute a delivery if the grantor did not intend that the title should then pass and he should lose control of the deed, and if he continued to exercise acts of ownership over the property as before, paid the taxes, made repairs, and treated the property as still his own.* Wilson vs. Wilson, 158 Ill. 567, 41

N. E. 1007, 49 Am. St. Rep. 176; *Russell vs. Mitchell*, 223 Ill. 438, 79 N. E. 141; *Elliot vs. Murray*, 225 Ill. 107, 80 N. E. 77; *Weigand vs. Rutschke*, 253 Ill. 260, 97 N. E. 641."

It is indispensable to the delivery of deed that the grantor shall part with control over it, with the intention that it shall immediately become operative to convey the estate described in it. If the grantor retains any dominion and control over the deed it is ineffectual as a conveyance. *Stinson vs. Anderson*, 96 Ill. 373; *Cline vs. Jones*, 111 Ill. 563; *Provart vs. Harris*, 150 Ill. 40, 36 N. E. 958; *Shults vs. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188; *Walter vs. May*, 170 Ill. 96, 48 N. E. 421."

Kananaugh vs. Kananaugh, 103 N. E. 65.

This brings the Court to a consideration of these rules as applicable to the facts of the case, and no reasonable inference of the facts can be drawn as to permit any possible conclusion that these requirements with respect to delivery have been made. [55]

It is, of course, clear that if this deed together with the Maikanai and Hewahewa deeds were found in the bureau of the deceased where he kept his other papers, there could have been no delivery. The mere fact that Solomon also had access to these papers raises no presumption whatsoever in favor of any delivery. In the case of *Huey vs. Huey*, 65 Mo. 689, where the facts bore some resemblance to the situation in this case, the Court had occasion to say:

“It is quite clear from the testimony, that Enoch Huey executed the conveyance in question, with the purpose of thereby conferring upon his son, at some time the title to the land described in said deed; and it is equally clear that this was communicated by him to the son, and that the time fixed upon in the mind of the father for so vesting the title, was at or after his own death. Now, it is evident that in order to effectuate this purpose, something more was necessary *than the mere execution of the deed, and the lodgment thereof in a place to which the son had access during his life,* and from which he could without hindrance, transfer it to his own possession after his death. Delivery is essential to make a deed effective, and this delivery must be in the lifetime of the grantor.”

This Court does not hold that the fact that these papers were found among the papers of the deceased, to which the defendant had access, would of itself absolutely preclude any inference of a prior delivery during the lifetime of the [56] deceased, as it is, of course, possible that the defendant might have kept these papers in the bureau after a full and complete delivery to him. But in view of the defendant's positive testimony that he never kept these papers in the bureau, he cannot claim possession of this deed upon any possible theory that he kept this deed in the bureau as his own. I believe the more reasonable and logical testimony of all of

the other witnesses to the effect that this deed was taken by Solomon from the bureau.

Even indulging in the violent assumption that the defendant's testimony was true with respect to the circumstances attending the alleged execution and delivery of these deeds, the facts fall very far short of being sufficient to constitute a delivery.

An analysis of Solomon Lalakea's testimony discloses the following situation:

T. K. Lalakea, his father, being in poor health, had discussed with his children the matter of the testamentary disposition of his property among his children. He had in mind a division of his property after his death. In speaking to his children he always referred to "leaving" his property to his children after his death. He had had these deeds prepared, each of which contained a clause reserving to him a life interest in the property and providing also that the deeds should not take effect until after his death. At the time of the alleged execution and delivery of these deeds, Solomon was looking after the business affairs of his father and [57] taking care of his deeds and mortgages. For the purpose of witnessing the execution of the deeds, T. K. Lalakea called in a witness, Namahoe. T. K. Lalakea had executed many instruments in his lifetime and was familiar with the importance of the acknowledgment of instruments before a notary public, but nevertheless he did not send for Mr. O. T. Shipman, the attorney who drew these deeds and who was a notary public and whose office was but a few

hundred feet away from the home of Lalakea. After the alleged execution of the deeds, T. K. Lalakea handed them to his son and asked him to hold the deeds until he passed away and then to have them "hooiaio"—which Solomon understood to mean "acknowledged." He knew that it did not mean recorded. Solomon took these deeds and placed them in a document box which in turn he put in a shoe-box and kept them in this box on a shelf in the dining-room. Solomon did not know at that time whether or not these deeds, by reason of the lack of the notary's acknowledgment certificates, were good, and as a matter of fact he assumed that they were not valid without such acknowledgment. On the morning of the day of the death of the father, he told his son to carry out his instructions with regard to these deeds. He had not seen to the acknowledgment of these instruments before then because that would have been contrary to his father's instructions and he acted only pursuant to the directions of his father. After he had been so directed by his father to carry out these instructions he proceeded to Mr. Shipman to take his father's acknowledgment although at that time Solomon knew that his father had become unconscious and that these instruments could not be acknowledged without having the notary affix a false certificate. [58]

I am now brought to the inquiry from the situation as above embodied in the testimony of the defendant what circumstance or circumstances can

lead to a conclusion that at the time that T. K. Lalakea handed the deeds to his son he had the intention to then and there transfer to Solomon a then present interest in the property and that from that moment he was to loose all dominion and control of these deeds. Surely the mere fact that it might have been the deceased's intention to ultimately leave the property in question to the defendant cannot be taken as indicating an intention to give Solomon any interest in the property before the former's death, and cannot be taken as that intention which should accompany the manual passing of the deed requisite to a delivery. These deeds before they were alleged to have been signed had been kept in the bureau the place from which the plaintiff and her witnesses testified they were taken and it is not claimed by Solomon that his father gave him any instructions not to return them to the same place from which they had been taken. What, then, must be gathered from these related circumstances as the intention of T. K. Lalakea at the time he handed Solomon the deeds?

I find that from the situation as presented by the testimony of the defendant, even assuming such to be true, no other conclusion can be drawn than that T. K. Lalakea attempted to effect a testamentary disposition of his property. All of the circumstances would point clearly to no other conclusion. [59]

Assume further that Solomon's understanding that he was instructed to hold these deeds and have them acknowledged after his father's death was a

correct one (and in view of the real meaning of "hooiaio," such an assumption would be as violent as some of the other assumptions made in favor of the defendant). He was then instructed to hold the deeds and have them acknowledged after his father's death. This clearly shows affirmatively an intention on the part of T. K. Lalakea not to complete the conveyance before his death. It is undoubtedly evident that the father assumed an acknowledgment essential to complete execution of a conveyance and sought to protect himself against losing any interest in the property by admitting one of the formalities of a complete conveyance, so that he could keep control of the deeds and make any changes in the event he should so desire. It cannot be contended that he deferred effecting an acknowledgment merely because no notary was present, because the evidence shows that he could have had the presence of a notary with less effort and in less time than it took to get Namahoe to the house to witness his signature. So that if T. K. Lalakea's failure to effect these acknowledgments was deliberate and designed, the Court holds of necessity that T. K. Lalakea had some reason for it. No other reason would be possible to conceive than the simple reason that he assumed the conveyance not completed until after it had been acknowledged, and that up to the time of T. K. Lalakea's death he had not considered that he had made delivery of the deed to Solomon, His father indicated by the alleged fact that he directed [60] Solomon as he was nearing death, to carry

out the instructions with reference to these deeds, his right to exercise dominion and control of these instruments, and the defendant seemingly accepted it as a matter of course that his father had the right to do as he pleased with these deeds. In fact, Solomon testified that he was acting under orders from his father.

But go still further according to the explicit directions and conditions under which T. K. Lalakea was alleged to have handed these deeds to Solomon, there could have been absolutely no delivery. It is, of course, immaterial what Solomon understood his father to have said to him at the time he handed him these papers. The only pertinent and important thing was what in fact was said by his father. Solomon said that his father told him to hold these papers until his death and then to have them acknowledged. When questioned as to what word was used for acknowledge, Solomon said "hooiaio." The witness Namahoe was positive in his testimony that that was the word that was used and his testimony was clear on the point that that word did not mean "acknowledge" but that it did mean "probate." The word "acknowledge" was entirely different and not even related to the word "hooiaio." All that can be gathered from Solomon's testimony in this respect is that he thought that his father meant that he should have these deeds acknowledged. As a matter of fact, if we are to accept Solomon's version as true, he was then instructed, as Namahoe testified, that he was to hold these instruments and have them probated,

as Namahoe defined the word “hooiaio” and as the [61] interpreter defined and translated this word. This Court under the decision of Hapai vs. Brown, 21 Haw. 499, takes judicial notice of the real meaning of this Hawaiian word. The Court finds that “hooiaio” means “probate” as Mr. Swain, the interpreter stated. This word is evidently a derivative of “hooilina” declared in Kalihilihi vs. Kaina, 5 Haw. 330, to mean “devise” as a verb and “devise” as a noun. It would be ridiculous to assume that if, as a matter of fact, T. K. Lalakea did give these instructions and did place these as a condition under which the deeds were to be held, he should have been understood to have meant that these deeds should be acknowledged after his death, as he was too experienced a man not to know that the ordinary acknowledgment involves the personal appearance of the grantor before a notary public and he could not have been credited with the extraordinary intention of having these instruments acknowledged in the manner that they were, that is, by means that even experienced lawyers must consult the statutes in order to be able to follow.

If, therefore, T. K. Lalakea signed these instruments by the terms of which he sought to dispose of his property after his death and placed all of these instruments in the hands of the person who then had general charge of his affairs with instructions to hold them until he died and that after his death he should then have the disposition of that property effectuated by the probate of these instruments, then most clearly [62] there

can be gathered no other intention from such circumstances than an intention to effect a testamentary disposition of his property. This presented a state of circumstances absolutely inconsistent with any possible theory of a transfer of a then present interest by a passing of deeds to effect immediate delivery under such circumstances as to cause the grantor to loose all dominion and control of such deeds.

A case that has many of the earmarks of the case at bar is *Tweksbury vs. Tweksbury*, 111 N. E. 394 (Mass. 1916), where two deeds were made by R. H. Tweksbury's son to his stepmother. The deeds were handed to the wife of R. L. Tewksbury and then she handed them back and he retained possession until his death.

“The mere manual act of handing the deeds to the defendant was not enough to constitute legal delivery. An intention that the deeds should operate as a present conveyance of title was also essential. What Robert L. Tweksbury apparantly undertook to do was to retain control of the deeds with the power and right to change the disposition of the property during his lifetime. The deeds were not to become operative and effectual, either as to title or enjoyment, until his death. This was essentially an attempt to make a testamentary disposition of his property without complying with the formalities required by our statute of wills. *Stevens vs. Stevens*, 150 Mass. 557, 23 N. E. 378; *Parrott vs. Avery*, 159 Mass. 594,

35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465; *Russell vs. Webster*, 213 Mass. 493, 100 N. E. 637."

The following case bearing some analogy to certain phases of the case at bar is in point. *Jones vs. Loveless*, 99 Ind. 317. See also *Butts vs. Richards*, 1914C Ann. Cas. 854. [63]

Another case that is somewhat analogous to the case at bar is *Pemberton vs. Kraper*, 124 N. E. 611 where a mother made a deed to her daughter, signed and executed it, and then the deed was recorded by her stepson and returned to her and kept in her possession. The opinion of the Court, holding the deed was never legally delivered, serves as a very instructive authority in the application of the principles relating to delivery.

Another important point bearing upon the question of delivery in this case arises from the question as to the sufficiency of the acceptance of the deed in question by Solomon Lalakea.

It has been noted that as an essential element to the sufficiency of a delivery of a deed, there must be a complete acceptance. Without acceptance there can be no complete delivery.

"It is clear upon all the authorities that delivery and acceptance is essential to the validity of every deed."

Renchan vs. McAvory, 38 L. R. A. (N. S.) 941, 945.

The Court finds even according to the testimony of Solomon Lalakea, he did not effect a com-

plete acceptance of the deed—during his father's lifetime.

Solomon admitted that he held these deeds solely because of instructions from his father to "hold" them. He never presumed to exercise any dominion over them.

"Q. You delayed more than two months to get Shipman's acknowledgment?

A. I did not delay, it was upon instructions that I followed. (Transcript, p. 51.)

Q. Now, why did you delay a matter of such importance as this?

A. Well, I did what I was instructed to do. (Transcript, p. 52.) [64]

Q. When was the first time you found out? (As to acknowledgments after death.)

A. I went to Judge Wise and he gave me instructions what to do so I did.

Q. Otherwise these deeds would be useless?

A. *I did not know anything about that.*

Q. The deeds in question, did you think that they were good or did you think they were invalid?

A. *I did not know anything about that.* (Transcript, p. 52.)"

First, Solomon simply held these deeds subject to instructions from his father, thereby acquiescing in the control and dominion over same by his father,—the fact that he likewise held the deeds to his sisters adds force to this conclusion—and,

second, that he did not know whether or not these instruments were valid deeds.

If he held these deeds simply as agent for his father, then, clearly, there has been no acceptance of same as a delivery to him. If he did not know that these were valid deeds and held them on the assumption that something more was to be done with reference to same in order to effect a complete execution, then it is equally as clear that he had not taken the deed in question as a delivery of a completed instrument to him. From the foregoing authorities it will be noted that at the time of delivery there must be present an intention on the part of the grantee to accept absolutely in concurrence with the intention to give.

The burden of proof is upon the party alleging delivery who in this case is the defendant. It would therefore not be sufficient [65] merely for the defendant to prove facts from which an inference of delivery could be drawn, but facts which must be sufficient to preclude any inference of no delivery.

THEREFORE, ASSUMING THE ALLEGED DEED TO HAVE BEEN EXECUTED, THERE WAS NO DELIVERY SUFFICIENT TO PASS TITLE.

The next question for the Court to pass upon is, assuming Solomon and his witness told the truth, is the instrument in question a testamentary disposition of the property therein described and void as a deed?

This is a mixed question of law and fact.

It is predicated upon the following reservation in the deed in question:

“To have and to hold the above described and granted property together with all and singular the rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining unto the said party of the second part for and during the term of the natural life of him the said party of the second part, with remainder over to his heirs in fee simple forever, saving and reserving however to myself the said grantor, party of the first part herein, the entire use and possession the said premises and the rents and profits thereof during the remaining term of my life, and nothing in this deed shall be construed to give to the said Solomon K. Lalakea, party of the second part, any right of possession or otherwise in or to said property, until the death of myself the grantor herein.”

The Court finds because of the above-quoted reservation taken in connection with the most favorable view of evidence introduced in behalf of the defendant, bearing upon the circumstances attending delivery, passes no present interest in [66] the land to the grantee, and is therefore testamentary in character and is good only as a will, if executed in compliance with the requirements of the statute pertaining to wills. While this deed bears the necessary number of witnesses under the statute and on the assumption of the

truth of the defendant's testimony was executed, with the formalities required for wills, the defendant nevertheless could not take under this instrument as a will because of the fact that he was one of such witnesses.

The above provision in the deed that "nothing in this deed shall be construed to give to the said Solomon K. Lalakea, party of the second part, any right of possession or *otherwise in or to* said property, until the death of myself, the grantor, herein," and the further provision that this deed shall have no force or effect until the grantor's death, under the decisions cannot be construed as conveying any present interest in the property and is revocable as a conveyance and therefore testamentary in character.

In *Sappingfield vs. King*, 8 L. R. A. (N. S.) 1066, the deed in question contained this provision:

"This deed is made with the full understanding and upon the condition that the same shall take effect from and after the death of the said grantor herein, and it is understood and intended that this deed shall be recorded immediately after my death."

The Court in that case after discussing another phase of the case (delivery), adds: [67]

"The form of the deed, however, renders it testamentary, and therefore revocable at any time, even though delivered. This is the effect of the clause which provided that the deed is made with the full understanding and upon the condition that the same shall take effect

from and after the death of the said grantor. If the deed purported to convey or pass to the grantee a present interest in the property and the deed was delivered, then the deed was operative at once and beyond the recall of the grantor, notwithstanding the reservation of a life estate; but where the instrument does not pass any present interest to the grantee, its effect is testamentary, and not that of a conveyance.

“In *Turner vs. Scott*, 51 Pa. 126, it was held that the words in an indenture, ‘and this conveyance in no way to take effect until after the decease of the said John Scott, the grantor,’ limited the granting words to take effect only after the death of the grantor, and they were necessarily revocable; and that the doctrine of the cases is that, whatever the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. In *Millican vs. Millican*, 24 Tex. 426, 442, it is held that voluntary dispositions of property by deed, which did not operate, a present transfer of the property, out of the donor, or to vest a present interest in the donee, but where made to take effect only after the death of the donor, were testamentary, and, if there is any doubt as to the intent of the grantor to pass the title presently, the circumstances surround-

ing the transaction may be looked upon to determine that matter, but not to dispute the plain tenor of the instrument. *Evans vs. Smith*, 28 Ga. 98, 73 Am. Dec. 751, *Gage vs. Gage*, 12 N. H. 371; *McGee vs. McCants*, 1 M'Cord L. 517. Here the parties contemplated an arrangement for the disposition of their property after the death of both, and the provisions of the deed above quoted, together with the fact of the instrument being left in the hands of the scrivener without any direction as to its disposition, indicated no intention to deliver, and by its terms, it is testamentary and is therefore revocable. [68]

“There are a few cases holding that such a deed is operative as such, and irrevocable even though it does not convey a present interest. *Wilson vs. Carrico*, 140 Ind. 533, 49 Am. St. Rep. 213, 40 N. E. 50, construes such a deed as conveying an estate to commence *in futuro*; such an estate being expressly authorized by the Indiana statutes. Ind. Rev. Stat. 1881, § 2959. In *Shackelton vs. Sebree*, 86 Ill. 616, 621, the conveyance is sustained as a deed on the theory of a covenant of the grantor to stand seised to the use of the grantee, and *Abbott vs. Holway*, 72 Me. 307, is to the same effect. In Georgia the cases are very conflicting. *Sperber vs. Balster*, 66 Ga. 317, holds such a deed conveys no present title and is testamentary; and in *West vs. Wright*, 115 Ga. 277, 41 S. E. 602, the Court holds to the contrary, although there is a dissenting opinion on this one question. In *Lauck vs. Logan*, 45

W. Va. 251, 31 S. E. 980, the opinion states the law to be that, 'if the intention, gathered from the whole paper, is that no estate is to pass until his (the grantor's) death, it is a will, not a deed.' The deed in that case contained the words: 'But it is hereby distinctly understood and stipulated that this deed shall take and be in full force and effect immediately after the said William Logan shall depart this life, and not sooner.' As to the rule just quoted the Court then says: 'Though seeming to me to be unreasonable, it is entrenched behind many decisions through many years, and we cannot repeal it'; and then proceeds to hold that the granting words must control, and the words of the deed above quoted reserve only a life estate in the grantor. In some of these cases the deeds [69] were not executed with all the formality required for the execution of wills, and, if not valid as deeds, they were void for any purpose, and that was one of the controlling elements in upholding them as deeds. This is the case in Indiana, Illinois and Georgia.

"But the greater weight of the authorities hold that, in determining whether such an instrument is a deed or a will, the main question is: Did the maker intend to convey any estate or interest whatever to vest before his death and upon the execution of the paper, or, upon the other hand, did he intend that all the interest or estate should take effect only at his death? If the former, it is a deed; if the latter, it is testamentary and revocable. The language limiting the taking effect of the deed sim-

ilar to that in the case there and as quoted from *Turner vs. Scott*, *supra*, has been held in the following cases to convey no present interest but rendered the instrument testamentary and therefore revocable: *Gilham vs. Mustin*, 42 Ala. 365, *Leaver vs. Gauss*, 62 Iowa, 314, 17 N. W. 522; *Hazleton vs. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Bigley vs. Souvey*, 45 Mich. 370, 8 N. W. 98; *Conrad vs. Douglas*, 59 Minn. 498, 61 N. W. 673; *Cunningham vs. Davis*, 62 Miss. 366; *Murphy vs. Gabbert*, 166 Mo. 596, 89 Am. St. Rep. 733, 66 S. W. 536; *Pinkham vs. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Turner vs. Scott*, 51 Pa. 126; *Babb vs. Harrison*, 9 Rich. Eq. 111, 70 Am. Dec. 203; *Armstrong vs. Armstrong*, 4 Baxt. 357; *Carlton vs. Cameron*, 54 Tex. 72, 38 Am. St. Rep. 620. Also there is a note to *Hazleton vs. Reed*, *supra*, in 32 Cent. L. J. 512, [70] by Jesse A. McDonald, and a leading article by W. W. Thornton, of Indiana, in 19 Cent. L. J. 47, commenting on the case of *Leaver vs. Gauss*, *supra*, to the same effect. And, if the deed is in fact testamentary, even though it be delivered, it is revocable. Such is the case of *Turner vs. Scott*, *supra*, where it was delivered and recorded. *Pennington vs. Pennington*, *Bigley vs. Souvey*; and *Conrad vs. Douglas*, *supra*; *Hannig vs. Hannig* (Tex. Civ. App.) 24 S. W. 695. And we hold that plaintiff had no intention to part with the control of the deed presently, and, further, that the deed was testamentary, and therefore revocable.”

In *Murphy vs. Gabbert*, 89 Am. St. Rep. 733, the purported deed which was the subject of that case was declared a will because of the following provision:

“The intention of this instrument of writing is such that Mrs. Ann Ellison relinquishes her entire right at her death, then this deed is to immediately come into effect but not until then.”

In so holding the Court stated as follows:

“Defendants, however, claim that the deed is testamentary in character, and is therefore void as a deed. It is well settled that instrument of writing, to be good as a deed, must pass a present interest in the property attempted to be conveyed and that where it takes effect and becomes operative alone upon the death of the grantor; it is testamentary in character and insufficient as a deed. *Miller vs. Holt*, 68 Mo. 584; 1 *Devlin on Deeds*, sec. 309; *Pinkham vs. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Turner vs. Scott*, 51 Pa. St. 126; *Leaver vs. Gauss*, 62 Iowa, 314, 17 [71] N. W. 522; *Donald vs. Nesbit*, 89 Ga. 290, 15 S. E. 367; *Bigley vs. Souvey*, 45 Mich. 370, 8 N. W. 98; *Nichols vs. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43, 41 Pac. 1089; *Conrad vs. Douglas*, 59 Minn. 498, 61 N. W. 673; *White vs. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Hazelton vs. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86, 26 Pac. 450; *Singleton vs. Bremar*, 4 McCord (S. C.), 12, 17 Am. Dec. 699; *Habergham vs. Vincent*, 2 Ves. 204; *Han-*

nig vs. Hannig (Tex. Civ. App.), 24 S. W. 695, In re Diez's Will, 50 N. Y. 88; Cunningham vs. Davis, 62 Miss. 366. The test to determine whether an instrument is a deed or a will is whether it is to take effect *in praesenti* or after the death of the maker. The case at bar, therefore, depends upon the construction to be given, to the clause in the instrument which provides that: 'The intention of this instrument of writing is such that Mrs. Ellison relinquished her entire right at her death, then this deed is to come immediately into effect, but not until then.'

"While the instrument contains the usual words, 'grant, bargain, and sell' they by no means control as to the time when it took effect, which must be determined by the clause quoted. In Turner vs. Scott, 51 Pa. St. 126, on November 22, 1849, John Scott executed to his son an instrument or writing purporting to convey to him his farm. The consideration for the instrument was the natural love and affection which the father had for his son, an agreement [72] upon the part of the son that he would live with his father, assist him in his work on the farm, and maintain his mother during her natural life if she outlived her husband. The instrument provided: 'Exception and reserving, nevertheless, the entire use and possession of said premises unto the said John Scott and his assigns for and during the term of his natural life; and this convey-

ance in no way to take effect until after the decease of the said John Scott, the grantor.' The Court said: 'We see nothing in the covenant of warranty to change our construction of the operative words of the grant. As these words were expressly limited to take effect only after the death of the grantor, they were necessarily revocable words. The doctrine of the cases is, that whatever, the form of the instrument, if it vest no present interest, but only appoints what is to be done after the death of the maker, it is a testamentary instrument. It signifies nothing that the parties meant to make a deed instead of a will. If they have used language which the law holds to be testamentary, their intention is to be gathered from the legal import of the words they have employed, for all parties must be judged by the legal meaning of their word.' "

The Turner vs. Scott case referred to in the above opinion, wherein the reservation in the deed was so similar to the one in the case at bar, is particularly in point in view of the clause reserving to the grantor the use of the property during his life.

In the Murphy vs. Gabbert case, *supra*, is cited with approval the case of Leaver vs. Gauss, 62 Iowa, 314, 17 N. W. [73] 522, wherein the objectionable clause was almost identical with the one in the Lalakea deed, the clause containing the following language:

“It is hereby understood and agreed between the grantors and the grantee that the grantee shall have no interest in the said premises as long as the grantors or either of them shall live.”

The Iowa Court held that because of this provision there was not even a present interest to commence at a future day created as contemplated by the statutes of that state, and that the conveyance was testamentary in character and could be revoked by the grantors at their option. And this, notwithstanding a valuable consideration, may have been paid therefor.

It is generally held that whether an instrument in the form of a deed but to take effect upon the death of the grantor is to be construed as a deed or a will depends primarily upon whether the grantor intended to pass a present irrevocable interest in the property, or whether he intended that no interest should pass to the grantee until after his death. It has been also generally held that where there are no other means by which the intention of the maker of the instrument can be definitely ascertained, except from the fact that it has the form of a deed, we must look to the operative words by which to determine whether or not the intention was to create a present interest or an interest purely testamentary. [74]

There is some conflict in the authorities as to the effect given operative words such as “this deed shall not take effect until the death of the grantor”—a few authorities holding that (particularly in

view of other extraneous circumstances) such words merely defer the right of possession until the death of the grantor,—the only case called to the attention of the Court where the words used are practically identical with those used in the Lalakea deed in the above-cited case of *Leaver vs. Gauss*, 17 N. W. 522, in which case the Court clearly pointed out that from these words there appears no intention to create a present interest.

It has been held that a testamentary intention is revealed where the operative words are: "This conveyance in no way to take effect until after the decease of the grantor." *Coulter vs. Shelmadine*, 53 Atl. 638.

The following are additional illustrative cases in which words to the same general effect have been held to show a testamentary intention upon the part of the maker and in no way to convey a present interest.

Johnson vs. Yancey, 20 Ga. 707;

Murphy vs. Gabbert, 66 S. W. 536;

Pinkham vs. Pinkham, 76 N. W. 411;

Beaumont's Estate, 63 Atl. 1023;

Gingrich's Appeal, 17 Atl. 33;

DeBajligethy vs. Johnson, 56 S. W. 95.

In *Burlington University vs. Barrett*, 22 Iowa, 60, the Court said: [75]

"In determining the character of the instrument, as to whether it is testamentary or contract, the Court *do* not allow the use of language peculiar to either class of instruments, nor even the belief of the maker as to its character to

control inflexibly their constructions of it; but, giving due weight to these circumstances, Courts look further, and, weighing all the language as well as the facts and circumstances surrounding the parties and attending the execution of the instrument, give to it such construction as will effectuate the manifest intention of the maker.”

Applying the rules set forth in the opinion last quoted, it does not seem that there can be any question as to what the Court can gather to have been the intention of T. K. Lalakea if he ever executed these deeds, and that that intention was to make a testamentary disposition of his property. Even according to the theory of the defendant, T. K. Lalakea, in discussing his property matters with his children, was planning upon a testamentary disposition of his property. The so-called deed recites as the consideration “the love and affection that he bears toward the said party of the second part as his son.” He executed various other deeds at the same time, intending thereby to make disposition of all of his property. In each of these deeds is contained the same clause with respect to the grantee having absolutely no right in the property until after the grantor’s death, and reserving the use of the property until his death. He purposely [76] and designedly refrained from having these instruments acknowledged as deeds. AND HE GAVE EXPLICIT INSTRUCTIONS TO HAVE THESE INSTRUMENTS PROBATED.

It seems, in fact, that he did about everything he could have done with respect to these instruments

except to entitle these instructions as wills. It would be a violent stretch of imagination to assume that T. K. Lalakea entertained any other intention at the time of the alleged execution of the deeds than to make a testamentary disposition of his property or that he was entertaining the remotest idea of doing anything other than to make provision for a division of his property *after his death*.

There is some conflict of authority as to the effect to be given operative words in a deed providing that such instrument shall not take effect until the death of the grantor, I feel the case of Ihihi vs. Kahaulelio, 263 Fed. 817, settles the rule in this jurisdiction in favor of the principle that operative words, providing that the instrument should not take effect until the death of the grantor, convey no present interest and are testamentary in their nature. This case was decided by the Circuit Court of Appeals of the Ninth Circuit on writ of error from the Supreme Court of the Territory of Hawaii, reversing the decision of the latter court reported in 24 Hawaiian, 292. The Circuit Court of Appeals in this case, while recognizing other decisions that have held to the contrary, state the principle as follows: [77]

“IT IS THE GENERAL RULE THAT AN INSTRUMENT, WHATEVER FORM IT MAY TAKE, WHICH PASSES NO PRESENT INTEREST, BUT IS TO TAKE EFFECT ON THE DEATH OF THE MAKER, IS TESTAMENTARY IN CHARACTER,

AND OPERATES AS A WILL, IF EXECUTED WITH REQUISITE FORMALITIES. IF IT IS 'PARTLY OR WHOLLY IN THE FORM OF A DEED, IT IS NOT A DEED, IF IT IS *NOT BE* BECOME OPERATIVE UNTIL THE MAKER'S DEATH.' 40 Cyc. 1085, 18 C. J. 149; Bowdoin College vs. Merritt (C. C.), 75 Fed. 480; Leaver vs. Gauss, 62 Iowa, 314, 17 N. W. 522; Babb vs. Harrison, 9 Rich. Eq. (S. C.) 111, 70 Am. Dec. 203; Turner vs. Scott, 51 Pa. 126; Conrad vs. Douglas, 59. Minn. 498, 61 N. W. 673; Bigley vs. Souvey, 45 Mich. 370 — N. W. 98; Hazelton vs. Reed, 46 Kan. 73, 26 Pac. 450, 26 Am. St. Rep. 86; Carlton vs. Cameron, 54 Tex. 72, 38 Am. St. Rep. 260; Sappingfield vs. King, 49 Or. 102, 89 Pac. 142, 90 Pac. 150, 8 L. R. A. (N. S.) 1066; Murphy vs. Gabbert, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733; Pinkham vs. Pinkham, 55 Neb. 729, 76 N. W. 411."

In the case referred to, following the granting clause, the instrument contained this provision: "Provided, however, not until after my death shall this deed be of effect and if Isaac should die before, then this land shall revert to me and this instrument be of no effect." The consideration was \$1.00 and "love." It seems that the point as to this [78] instrument being a testamentary disposition of the property therein described was not raised in the Supreme Court and that Court sustained the instrument as an absolute conveyance unaffected by the clause above quoted upon the theory that that clause

was entirely repugnant to the granting clause, and following the rules of law applicable to the construction of deeds, held that the granting clause should stand and the latter clause being so repugnant should be disregarded. The Circuit Court of Appeals held that construing the instrument in question as a testamentary disposition of the land therein described, these clauses would not be repugnant, but would be perfectly consistent with a disposition of the property to take effect upon the death of the grantor and hence the instrument could not stand as a deed, and accordingly reversed the ruling of the Supreme Court declaring the instrument to be a deed conveying a present interest in the land.

This deed is testamentary in character and is good only as a will.

Let judgment be entered in favor of plaintiff and against defendant for an undivided one-eighth interest in the lands described in plaintiff's amended complaint, as follows, to wit: [79]

1.

All that tract of land situate at Kukuihaele, Hamakua, County and Territory of Hawaii, described in R. P. 933, conveyed to him, the said Thomas K. Lalakea by Keamo by deed dated the 16th day of October, 1903, containing an area of 103 acres, more or less and being a portion undivided, of the Estate of Moheawe, deceased.

2.

All that tract of land situate at Kukuihaele, aforesaid, described in R. P. 933, conveyed to him the said Thomas K. Lalakea, by Pihana (W.) by deed

dated the 18th of November, A. D. 1911, containing 103 acres, more or less, and being a portion, undivided, of the Estate of Mokeawe.

3.

All that certain tract of land situate at Kaiwilahilahi, North Hilo, County of Hawaii aforesaid, described in R. P. 2729, conveyed to him, the said Thomas K. Lalakea, by J. Poka Hanaaumoe by deed dated the 14th of September, 1885.

4.

All that certain tract of land situate at Waiakea, South Hilo, County of Hawaii aforesaid, conveyed to him, the said Thomas K. Lalakea, by the Reverend W. M. Kalaiwaa by deed dated the 3d of December, 1908. [80]

5.

All that certain tract of land situate at Punahoe, 1, South Hilo, aforesaid, containing .48 acre, described in R. P. 2176, L. C. A. 465, conveyed to him, the said Thomas K. Lalakea, by deed of S. Kane dated the 8th of August 1899.

6.

All that certain tract of land situate at Papaa, South Hilo, aforesaid, containing 11 acres, described in R. P. 1948, L. C. A. 190, conveyed to him, the said Thomas K. Lalakea, by S. Kane by deed dated the 8th of August, 1899.

7.

All that certain tract of land situate at Kapehu, North Hilo aforesaid, containing .48 acre described in R. P. 1393, conveyed to him, the said Thomas K.

Lalakea, by S. Kane, by deed dated the 8th of August, 1899.

8.

All that certain tract of land situate at Punahoa, 2, South Hilo, aforesaid containing .40 acre described in R. P. 1149, L. C. A. 387, conveyed to him, the said Thomas K. Lalakea by Kalaona Kalana by deed dated the —.

9.

All that certain tract of land situate at Puueo, South Hilo, aforesaid, containing .75 acre, conveyed to him, the said Thomas K. Lalakea, by Hokukela by deed dated the —.

10.

All that certain tract of land situate at Kauhiula, South Hilo, aforesaid, containing 14.33 acres, described [81] in R. P. 133, conveyed to him, the said Thomas K. Lalakea, by Mana and Iakoba by deed dated the 27th of November, 1883.

11.

All that certain tract of land situate at Punahoa, 2, South Hilo, aforesaid, containing 835 square feet, conveyed to him, the said Thomas K. Lalakea by the first Hawaiian Church of Hilo, by deed dated the 12th of February, 1908.

12.

All those two certain lots situate at Kukuau, South Hilo aforesaid, containing respectively 1407.32 and 4592.18 square feet, and also that certain lot situate at Halepuna, South Hilo, aforesaid, containing 1 acre, more or less, described in R. P. 2979, all of which said lots were conveyed to him, the said

Thomas K. Lalakea, by Mrs. Kaili Keolanui by deed dated the 27th of November, 1908, and recorded in the Hawaiian Registry of Conveyances in Liber 340 on pages 410, 411.

13.

All that certain lot situate at Olaa, Puna, County of Hawaii aforesaid, containing 10 acres designated as Lot 37 and described in L. P. 5066, together with that certain lot situate at said Olaa, designated as Lot 38 and described in L. P. 4942, both of which said lots were conveyed by Kini Koakulana to him, the said Thomas K. Lalakea by deed dated the 27th day of November, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 335 on pages 351, 352. [82]

14.

All that certain lot situate at Kaiwiki, South Hilo, aforesaid, containing 10 acres described in R. P. 4119, conveyed to him the said Thomas K. Lalakea, by Yamafushi Keokichi by deed dated the 9th of November, 1903, and recorded in the Hawaiian Registry of Conveyances in Liber 250 on pages 4, 5.

15.

All that certain lot of land situate at Kaiwiki, South Hilo, aforesaid, containing 16.75 acres, described in R. P. 4298 and conveyed to him the said Thomas K. Lalakea by Watanabe Toyosuke by deed dated the 8th of December, 1902, and recorded in the Hawaiian Registry of Conveyances in Liber 241, on pages 351-356.

16.

A $\frac{1}{4}$ interest undivided in and to that tract of

land situate at Kalapana Puna aforesaid, conveyed to him the said Thomas K. Lalakea, by Sam Kana-kaole by deed dated the 8th of December, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 352 on pages 422-424.

17.

All that certain lot of land situate at Halepuna, Puna aforesaid, containing 4.22 acres described in R. P. 998, and conveyed to him the said Thomas K. Lalakea by W. K. Kealawaa, by deed dated the 2d of February, 1906, and recorded in the Hawaiian Registry of Conveyances in Liber 340 on pages 38, 39. [83]

18.

All that certain tract of land situate at Kukui-haele, Hamakua aforesaid, containing 3.35 acres described in R. P. 7872 and conveyed to him, the said Thomas K. Lalakea by Elisa Hawailipolepo by deed dated the 20th of June, 1905, and recorded in the Hawaiian Registry of Conveyances in Liber 370 on pages 384, 385.

19.

All that certain tract of land situate at Maonolulu, North Hilo, aforesaid, containing 81 acres, described in R. P. 2320.

20.

All that certain tract of land situate at Moku-honua, South Hilo, aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him, the said Thomas K. Lalakea by Joe Nahona Rock by deed dated the 17th of May, 1898, and recorded in the

Hawaiian Registry of Conveyances in Liber 181, on pages 205, 206.

21.

All that certain tract of land situate at Moku-honua, South Hilo, aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him, the said Thomas K. Lalakea by Kailiula by deed dated the 18th of May, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 183 on pages 82, 83. [84]

22.

All that certain tract of land situate at Moku-honua, South Hilo, aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132 conveyed to him the said Thomas K. Lalakea, by Kailiula by deed dated the 10th of August, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 186 on pages 71, 72.

23.

All that certain tract of land situate at Moku-honua, South Hilo, aforesaid, being a $\frac{1}{2}$ interest in and to an undivided $\frac{5}{12}$ interest in 12 acres, a portion of the land described in R. P. G. 1034. And damages and mesne profits in the sum of \$1575.00 as per stipulation entered into between the parties hereto on the 11th day of December A. D. 1920, etc.

Dated at Hilo, Hawaii, Territory of Hawaii, this 7th day of February, A. D. 1921.

(Sgd.) CLEMENT K. QUINN,
Judge, Circuit Court, Fourth Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed at 10 o'clock A. M., Feby. 7, 1921. T. J. Ryan, Clerk. [85]

[Title of Court and Cause.]

Judgment.

This cause having come on regularly for trial before this Court, the Honorable Clement K. Quinn, Judge of said Court, presiding, jury having been waived, and after hearing the evidence adduced by the parties, and the cause submitted to this Court for its determination of the issues herein, this Court, after due deliberation and consideration thereof, rendered and filed its decision herein on the 7th day of February, 1921, finding that the plaintiff is entitled to restitution of the property described in her amended complaint herein and to the recovery of damages in the sum of \$1,575, and costs; now, therefore, pursuant to said decision,

IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff recover and have restitution from the defendant of the said property described as follows, to wit:

An undivided one-eighth interest in and to the following parcels of real property:

1.

All that tract of land situate at Kukuihaele, Ha-

makua, County and Territory of Hawaii, described in R. P. 933, conveyed to him, the said Thomas K. Lalakea by Keamo, by deed dated the 16th day of October, 1903, containing an area of 103 acres, more or less, and being a portion undivided, of the Estate of Mokeawe, deceased.

2.

All that tract of land situate at Kukuihaele, aforesaid, described in R. P. 933, conveyed to him, the said Thomas K. Lalakea, by Pihana (W) by deed dated the 18th of November, A. D. 1911, and containing 103 acres, more or less, and being a portion, undivided, of the Estate of Mokeawe. [86]

3.

All that certain tract of land situate at Kaiwil-ahilahi, North Hilo, County of Hawaii aforesaid, described in R. P. 2729, conveyed to him, the said Thomas K. Lalakea, by W. Poka Hanaaumoe by deed dated the 14th of September 1885.

4.

All that certain tract of land situate at Waiakea, South Hilo, County of Hawaii aforesaid, conveyed to him, the said Thomas K. Lalakea, by the Reverend W. M. Kalaiwaa by deed dated the 3d of December, 1908.

5.

All that certain tract of land situate at Puna-hoe, 1, South Hilo aforesaid, containing .48 acre, described in R. P. 2176, L. C. A. 463, conveyed to him, the said Thomas K. Lalakea, by deed of S. Kane dated the 8th of August, 1899.

6.

All that certain tract of land situate at Papaa, South Hilo, aforesaid, containing 11 acres, described in R. P. 1948, L. C. A. 190, conveyed to him, the said Thomas K. Lalakea, by S. Kane, by deed dated the 8th of August, 1899.

7.

All that certain tract of land situate at Kahepu, North Hilo, aforesaid, containing .48 acre described in R. P. 1893, conveyed to him, the said Thomas K. Lalakea, by S. Kane, by deed dated the 8th of August, 1899.

8.

All that certain tract of land situate at Punahoe, 2, South Hilo, aforesaid, containing .50 acre described in R. P. 1149 L. C. A. 387, conveyed to him, the said Thomas K. Lalakea, by Kalaona Halana by deed dated the —.

9.

All that certain tract of land situate at Puueo, South Hilo, aforesaid, containing .75 acre, conveyed to him the said Thomas K. Lalakea, by Hokukela by deed dated the —.

10.

All that certain tract of land situate at Kauhiula, South Hilo, aforesaid, containing 14.33 acres, described in R. P. 133, conveyed to him, the said Thomas K. Lalakea, by Mana and Iakoba by deed dated the 27th of November, 1883. [87]

11.

All that certain tract of land situate at Punahoa, 2, South Hilo, aforesaid, containing 835 square feet,

conveyed to him, the said Thomas K. Lalakea, by the First Hawaiian Church of Hilo, by deed dated the 12th of February 1908.

12.

All those certain lots situate at Kukuau, South Hilo, aforesaid, containing respectively 1407.32 and 4592.18 square feet, and also that certain lot situate at Halepune, South Hilo, aforesaid containing 1 acre, more or less, described in R. P. 2979, all of which said lots were conveyed to him, the said Thomas K. Lalakea, by Mrs. Kaili Keolanui, by deed dated the 27th of November, 1908, and recorded in the Hawaiian Registry of Conveyances in Liber 340 on pages 410, 411.

13.

All that certain lot situate at Olaa, Puna, County of Hawaii, aforesaid, containing 10 acres designated as Lot 37 and described in L. P. 5066, together with that certain lot situate at said Olaa, designated as Lot 38 and described in L. P. 4942 both of which said lots were conveyed by Kini Koakulani to him, the said Thomas K. Lalakea, by deed dated the 27th day of November, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 355 on pages 351, 352.

14.

All that certain lot situate at Kaiwiki, South Hilo, aforesaid, containing 10 acres described in R. P. 4119, conveyed to him, the said Thomas K. Lalakea, by Yamafushi Keokichi by deed dated the 9th of November, 1903, and recorded in the Hawaiian

Registry of Conveyances in Liber 250 on pages 4, 5.

15.

All that certain lot of land situate at Kaiwiki, South Hilo, aforesaid, containing 16.75 acres, described in R. P. 4298 and conveyed to him, the said Thomas K. Lalakea, by Watanabe Toyosuke by deed dated the 8th of November, 1902, and recorded in the Hawaiian Registry of Conveyances in Liber 241 on pages 351-356. [88]

16.

A $\frac{1}{4}$ interest undivided in and to that tract of land situate at Kalapana, Puna aforesaid, conveyed to him, the said Thomas K. Lalakea, by Sam Kana-kaole by deed dated the 8th of December 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 352 on pages 422-424.

17.

All that certain lot of land situate at Halepuna, Puna aforesaid, containing 4.22 acres described in R. P. 998, and conveyed to him, the said Thomas K. Lalakea, by W. K. Kealawaa, by deed dated the 2d of February, 1908, and recorded in the Hawaiian Registry of Conveyances in Liber 340 on pages 38, 39.

18.

All that certain tract of land situate at Kukui-haele, Hamakua aforesaid, containing 3.35 acres described in R. P. 7872 and conveyed to him, the said Thomas K. Lalakea, by Elisa Hawailipolepo by deed dated the 20th of June, 1905, and recorded in

the Hawaiian Registry of Conveyances in Liber 370, pages 384, 385.

19.

All that certain tract of land situate at Maonolulu, North Hilo aforesaid, containing 81 acres, described in R. P. 2320.

20.

All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him, the said Thomas K. Lalakea by Joe Nahona Rock by deed dated the 17th of May, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 181, on pages 205, 206.

21.

All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him, the said Thomas K. Lalakea by Kailula by deed dated the 18th of May, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 183 on pages 82, 83. [89]

22.

All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132 conveyed to him, the said Thomas K. Lalakea, by Kailiula by deed dated the 10th of August, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 186 on pages 71, 72.

23.

All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being a $\frac{1}{2}$ interest in and to an undivided $\frac{5}{12}$ interest in 12 acres, a portion of the land described in R. P. G. 1034.

IT IS FURTHER ORDERED AND ADJUDGED, THAT THE PLAINTIFF HAVE AND RECOVER OF THE DEFENDANT the sum of \$1,575.00 as and for damages and mesne profits, together with attorneys' costs and disbursements in the sum of \$23.00 and costs of court in the sum of \$22.25, or a total of \$1,620.25.

WITNESS the Honorable CLEMENT K. QUINN, Judge of the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, at Hilo, Hawaii, this 9th day of February, 1921.

[Seal]

IRMA PATTEN,
Clerk.

The foregoing judgment may be entered.

CLEMENT K. QUINN,
Judge, Fourth Judicial Circuit.

[Endorsed]: Filed at 2:06 o'clock P. M., Feb. 9, 1921. Irma Patten, Clerk. [90]

[Title of Court and Cause.]

Defendant's Exceptions to Decision and Findings.

Comes now Solomon K. Lalakea, defendant in the above-entitled cause, and with leave of Court first had and obtained files these his written exceptions to the decision and findings of the Court heretofore filed in said cause.

Said defendant excepts to the ruling, decision and findings as follows:

1. To all that portion of the decision by which the Court found Thomas K. Lalakea at no time executed for delivered the deeds alleged to have been executed by him on March 6, 1915.

2. To all that portion of the decision which reads as follows:

“Daniel Namahoe is that type of witness which is familiar to old practitioners in Hawaii—that type of witness which is on hand supplying the missing links in adverse possession cases—that type of witness which furnishes or strengthens the family tree in land cases he was far from being calm, cool and deliberate and gave the Court the impression witness did not believe that the Court believed the witness was telling the truth—he carried with him the atmosphere of a coached witness who breathed perjury and the witness seemed to realize the [91] last few minutes he was on the stand that he made a fatal mistake in presenting himself as a witness in the case.”

3. To all that portion of the decision reading as follows:

“His (defendant’s) eyes were wild and rolling and he perjured himself in every material statement wherein he attempted to corroborate the statements of Daniel Namahoe as to the execution of the deeds.”

4. To all that portion of the decision reading as follows:

“Thomas K. Lalakea would not have exercised acts of ownership by executing a lease to land that he had conveyed fourteen days prior to Solomon.”

5. To all of that portion of the decision reading as follows:

“Defendant’s counsel, W. H. Smith, made one of the greatest tactical blunders when he perfected his interlocutory bill of exceptions after the Trial Court denied the motion for a nonsuit.”

6. All of that portion of the decision reading as follows:

“There (their) attitude entirely changed as to the defense between January 28, 1920, the date of the decision of the Trial Court overruling the motion for a nonsuit, and May 28, 1920, when they put in their defense.”

7. To all that portion of the decision reading as follows:

“No exception was offered or attempted as to why Namahoe was sent for by Thomas K. Lalakea to witness his signature.”

8. To all that portion of the decision reading as follows:

“These circumstances point to the fact that whoever signed these deeds, they were signed the same day that T. K. Lalakea died.”

9. To all of that portion of the decision reading as follows:

“Upon the considerations alone this Court would be justified in finding that there was no delivery.” [92]

10. To all that portion of the decision reading as follows:

“In addition to these facts, as bearing upon the question of delivery, the Court finds that this deed, together with the other deeds that had been prepared by Mr. Shipman, were still in the possession of the alleged grantor after his death. The defendant took these deeds from the bureau, which was the private bureau of the deceased and in which the other papers of T. K. Lalakea had been kept.”

11. All of the portion of the decision which reads as follows:

“But in view of the defendant’s positive testimony that he never kept these papers in the bureau, he cannot claim possession of the deed upon any possible theory that he kept this deed as his own.”

12. All of that portion of the decision which reads as follows:

“The facts fall very far short of being sufficient to constitute a delivery.”

13. All of that portion of the decision which reads as follows:

“I find that from the situation as presented by the testimony of the defendant, even assuming such to be true, no other conclusion can be drawn than that T. K. Lalakea attempted to

effect a testamentary disposition of his property."

14. To all that portion of the decision which reads as follows:

"Thus assuming the alleged deed to have been executed there was no delivery sufficient to pass title."

15. To all of that portion of the decision which reads as follows:

"This is a mixed-up question of long fact."

16. To all of that portion of the decision which reads as follows:

"This deed is testamentary in character and is good only as a will."

The foregoing exceptions are made on the ground that they are contrary to law, the evidence and the weight of the evidence, and the defendant herein gives notice that he will move for a new trial.

Dated, Hilo, Hawaii, February 10, 1921.

SOLOMON LALAKEA,
By CARLSMITH & ROLPH,
His Attorneys.

[Endorsed]: Filed at 11:55 A. M. February 10, 1921. (Sgd.) T. J. Ryan, Clerk. [93]

[Title of Court and Cause.]

Minutes of Court—December 18, 1919—Trial.

J. Lightfoot, Esq., appearing as attorney for the plaintiff.

W. H. Smith, Esq., and W. S. Wise, Esq., appearing as attorneys for the defendant.

The plaintiff and the defendant are present in court.

J. W. Bains is sworn as stenographer.

Mr. Lightfoot moves that the name of Russell & Patterson be entered as associate counsel with himself for the plaintiff.

The COURT.—“Let the name of Russell & Patterson be entered as associate counsel for the plaintiff.”

Mr. Lightfoot makes a statement to the Court and reads the complaint in open court.

Mr. Lightfoot moves to amend the complaint by excluding therefrom on page 6, the land described as 21, all that certain tract of land situate at Maonolulu, North Hilo.

The COURT.—“The motion is granted and the description of the property in the complaint under number 21 may be deleted.” [94]

Mr. LIGHTFOOT.—“It is hereby stipulated and agreed by and between the plaintiff and defendant by their respective counsel that the value of the thing in controversy in this action is greater than the sum of Five Thousand (\$5000.00) Dollars.”

The COURT.—“Let the stipulation appear of record.”

Mr. LIGHTFOOT.—“May it please the Court, we have arrived at an agreement in this matter which agreement will materially shorten the proceedings at the present time. So that we should try this case on the main issue and if your Honor should find for the defendant, that will be the end of the case as far as mesne profits are concerned.”

The COURT.—“That meets with the entire approval of the Court. The question of mean profits at this hearing will not be gone into but in the event that the Court should find for the plaintiff in the present action, the Court will then proceed further to take evidence as to the amount of mean profits.”

Mr. Lightfoot makes further statement to the Court, and questions counsel for defendant.

Mr. SMITH.—“We are willing to admit for the purpose of the present case that T. K. Lalakea named in the declaration was in his lifetime and prior to the date of that certain deed dated March 6, 1915, which will be offered in evidence by the defendant, seized of the pieces of land named in the declaration; that T. K. Lalakea died intestate on the 7th day of May, 1915; that Hannah Makainai is an heir at law of T. K. Lalakea, deceased. This stipulation is subject to the counter agreement by counsel for the plaintiff that we may offer in evidence, and there will be no objection that it be placed in evidence that a certain deed purported to have been executed by T. K. Lalakea, bearing date the 6th day

of March, 1915, and recorded in the office of the Registrar of Conveyances in Honolulu, on the 11th day of May, 1915, in Liber 428, on pages [95] 122-127; and that this deed shall be considered by them as constituting a *prima facie* case on the part of the defendant."

Mr. LIGHTFOOT.—"It is further stipulated and agreed that the land in question is in the possession of the defendant."

The COURT.—"Let the stipulation appear of record."

The plaintiff rests.

Mr. Smith offers in evidence a document purported to be a deed from T. K. Lalakea to Solomon K. Lalakea, dated the 6th day of March, 1915, and recorded in the office of the Registrar of Conveyances on the 11th day of May, A. D. 1915, in Liber 428, on pages 122-127. No objection.

The COURT.—"Let the deed offered be received in evidence and marked Defendant's Exhibit 1."

The defendant rests.

Mr. Smith requests that all witnesses be excluded from the courtroom. No objection.

The witnesses are excluded without the hearing of the Court.

O. T. Shipman called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Lightfoot. Mr. Lightfoot shows to the witness Defendant's Exhibit 1 and proceeds with the direct examination. The Court interrogates the witness.

Direct examination resumes.

Mr. Lightfoot calls upon counsel to produce the other deeds that the witness has referred to.

Mr. Smith announces that they decline at this time to produce deeds as called for.

Mr. Lightfoot calls upon counsel to produce the deed to Mrs. Makainai to which the witness referred to.

Mr. SMITH.—“Personally, I don’t know anything about that deed.”

Mr. Lightfoot calls the Court’s attention that the witness has not testified as to the execution of the deed.

Mr. Smith replies that he was not there to see the deed [96] executed at the time.

The COURT.—“If you have the deed, Mr. Smith, produce it, please.”

Mr. SMITH.—“The defendant has no deed in his possession or in the possession of his attorneys either literally, actually, constructively or in any respect.”

Direct examination resumes.

Mr. Lightfoot calls upon counsel to produce deed executed by T. K. Lalakea to Mrs. Hewahewa.
(Mr. Smith announces “same objection.”)

The COURT.—“If you have the deed, Mr. Smith, produce it, please.”

Mr. SMITH.—“My client informs me that he has no deed in his possession or in the possession of his attorneys either literally, actually or constructively or in any respect.”

Mr. Lightfoot calls upon counsel to produce

deed executed by T. K. Lalakea to Maria Lalakea.

Mr. SMITH.—“Same objection.”

The COURT.—“The objection is overruled. If you have the deed, Mr. Smith. please do so.”

Mr. SMITH.—“My client states that he has a deed to Maria Lalakea at home and under the order of the Court, we will produce it later.”

Mr. Lightfoot calls upon counsel to produce a deed executed by T. K. Lalakea to Mrs. Jennie K. Aona and Mrs. Mohihio Hewahewa.

Mr. SMITH.—“We have that deed in our possession.”

Direct examination resumed. The Court interrogates the witness.

Direct examination resumes. The Court interrogates the witness.

Direct examination resumes.

Mr. Lightfoot shows the witness Defendant's Exhibit 1.

With permission of counsel, Mr. Smith cross-examines the witness.

The Court interrogates the witness.

Cross-examination by Mr. Smith resumes. [97]

Mr. Lightfoot requests that the witness later on produce his notarial record.

Direct examination resumes.

At this time, to wit, 3:07 P. M., the Court takes a recess of thirteen minutes.

The trial resuming, O. T. Shipman, witness for the plaintiff takes the stand.

Cross-examination by Mr. Smith. With permission of counsel, Mr. Lightfoot examines the witness as part of his direct examination. Cross-examina-

tion resumes. The Court interrogates the witness. Mr. Smith, resuming cross-examination, shows to the witness a document purporting to bear the signature of T. K. Lalakea. The Court interrogates the witness. Cross-examination resumes.

Mr. Smith offers in evidence a deed dated the 30th day of November, 1931, executed by T. K. Lalakea to Fugimoto Nonosaku.

No objection.

The COURT.—“The document may be received in evidence and markes Defendant’s Exhibit 2.”

Mr. Smith offers in evidence another document dated the 5th day of August, A. D. 1907, the same being an agreement by and between T. K. Lalakea and Tsushima Ikei. No objection.

The COURT.—“The document may be received in evidence and marked Defendant’s Exhibit 3.”

Mr. Smith offers in evidence a document dated the 6th day of April, A. D. 1905, the same being a lease by and between T. K. Lalakea and Joao Martins. No objection.

The COURT.—“The document may be received in evidence and marked Defendant’s Exhibit 4.”

Charles H. Swain called and sworn as an Hawaiian interpreter.

Mrs. Mohihio Hewahewa called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Lightfoot.

In reply to the Court’s question as to how many more witnesses [98] Mr. Lightfoot announces that there will be besides this witness three or four witnesses.

The Court inquires counsel as to working.

Mr. Lightfoot announces that it will be imperative for him to return to Honolulu to-morrow, as the Attorney-General will soon leave for the Mainland and that there is Government business in Honolulu that requires his immediate attention. He further announces that Senator Russell knows all about this case only in a general way and for that reason he would like to ask for an adjournment until next week in order that Senator Russell may be more familiarized with the case.

Mr. Smith requests that the case be proceeded with until the plaintiff rests.

Direct examination by Mr. Lightfoot.

Mr. Lightfoot requests that he be permitted to copy of the original and that the witness produce the Deed that she received from Solomon K. La-lakea.

The Court interrogates the witness. Direct examination resumes.

Mr. Lightfoot announces that subject to the production of the deed by the witness counsel may cross-examine the witness. The Court interrogates the witness.

Cross-examination by Mr. Smith. The Court interrogates the witness.

Cross-examination resumes.

Mr. SMITH.—“I understand that one of these deeds as spoken of, in it there were three grantees, Mrs. Hannah Makainai, Mrs. Hewahewa and Mrs. Aona, and that the deed was delivered to Mrs. Aona,

and as far as I know, we could produce it in the morning."

Mr. LIGHTFOOT.—"Have you any information as to any other deeds?"

Mr. SMITH.—"We have the deed to George Lalakea."

Mr. Lightfoot requests counsel to produce that deed now and the same is produced.

Mr. Lightfoot offers in evidence deed to George Lalakea alleged to have been executed on the 6th day of March, 1915, by [99] T. K. Lalakea. No objection.

The COURT.—"The deed may be received in evidence and marked Plaintiff's Exhibit 'A.'"

Charles H. Swain, Hawaiian Interpreter.

Mrs. Hannah, plaintiff, called, sworn and examined as a witness on her own behalf.

Direct examination by Mr. Lightfoot.

Mr. LIGHTFOOT.—"It is admitted that the papers were taken from T. K. Lalakea's bedroom by Solomon Lalakea on the death of his father.

At this time, to wit, 5 P. M., the Court continues this cause until 7 P. M. to-day, and takes a recess until that time.

EVENING SESSION.

Mr. Lightfoot announces to the Court that he has a witness, Mr. David Hewahewa, who is quite feverish and sick, and requests that the present witness be withdrawn temporarily for the purpose of calling Mr. Hewahewa out of the regular order. No objection.

Mr. SMITH.—“It is understood that the witnesses for the defendant will not be called.”

Charles H. Swain, Hawaiian interpreter.

David K. Hewahewa called, sworn and examined as a witness for the plaintiff.

Direct examination by Mr. Lightfoot. The Court interrogates the witness. Direct examination resumes. Cross-examination by Mr. Smith.

Mrs. Hannah Makainai, plaintiff, recalled to the stand. Charles H. Swain, interpreter.

Direct examination by Mr. Lightfoot resumes. Mr. Lightfoot shows to the witness a document.

The COURT.—“Where is the original deed?”

Mr. SMITH.—“We have the original deed.”

Mr. Lightfoot offers in evidence a deed from T. K. Lalakea to Mrs. Hannah Makainai, Mrs. Mohio Hewahewa and Mrs. Jennie K. Aona, [100] dated the 6th day of March, 1915, the same being produced by Mr. Smith. No objection.

The COURT.—“The deed may be received in evidence and marked Plaintiff’s Exhibit ‘B.’ ”

Mr. Lightfoot offers in evidence as certified copy of the Plaintiff’s Exhibit “B.” No objection.

The COURT.—“The same may be received in evidence and marked Plaintiff’s Exhibit ‘B 1.’ ”

Mr. LIGHTFOOT.—“It is admitted that the witness did not receive Plaintiff’s Exhibit ‘A’ at the time of the execution.”

Cross-examination by Mr. Smith. The Court interrogates the witness. Cross-examination resumes.

The Court interrogates the witness. Cross-examination resumes.

The Court interrogates the witness. Cross-examination resumes.

The Court interrogates the witness. Cross-examination resumes.

Redirect examination by Mr. Lightfoot. Mr. Lightfoot examines the witness as part of his direct examination.

Paul Makainai, husband of plaintiff, called, sworn and examined as a witness for the plaintiff. Direct examination by Mr. Lightfoot. Charles H. Swain, interpreter.

Cross-examination by Mr. Smith.

Mr. LIGHTFOOT.—“May it please the Court, that concludes the evidence on the feature of the case. There is another matter to be presented and that is the genuineness of signatures.”

Mr. RUSSELL.—“If the Court please, from the very nature of the issue, it is not a matter we could prepare on.”

The COURT.—“I take it Mr. Smith that you have no objection to the continuance until Monday?”

The COURT.—“It should be continued to such date as it would be completed as a whole.”

Mr. RUSSELL.—“I would prefer any date subsequent to Monday.”

The COURT.—“Law No. 671, Hannah Makainai vs. Solomon K. Lalakea, [101] further hearing will be continued until Monday, December 29, 1919, at the hour of ten o'clock A. M.

At 8:20 P. M., Court adjourned until to-morrow morning at the hour of ten o'clock.

[Title of Court and Cause.]

Minutes of Court—January 14, 1920—Trial (Continued).

TO BE SET FOR FURTHER TRIAL.

J. W. Russell, Esq., of the firm of Russell & Patterson, appearing as attorney for the plaintiff.

W. H. Smith, Esq., appearing as attorney for the defendant.

The COURT.—“Law No. 671, Hannah Makainai vs. Solomon K. Lalakea, by consent, will be set for further trial on Monday, January 26, 1920, at the hour of ten o'clock A. M.” [102]

[Title of Court and Cause.]

Minutes of Court—January 26, 1920—Trial (Continued).

FURTHER TRIAL.

J. W. Russell, Esq., appearing as attorney for the plaintiff.

W. H. Smith, Esq., and W. S. Wise, Esq., appearing as attorneys for the defendant.

Came on for further hearing the above-entitled cause.

The respective parties being ready, H. V. Patten is called, sworn and examined as a witness for and on behalf of the plaintiff.

Direct examination by Mr. Russell. The Court interrogates the witness. Further examination by Mr. Russell.

Cross-examination by Mr. Smith. The Court interrogates the witness.

Cross-examination resumes. The Court interrogates the witness again.

Mr. Smith offers for the purpose of identification note dated Nov. 7, 1906. No objection.

The COURT.—“The note may be received for the purpose of identification and marked Defendant’s Exhibit ‘A.’ ”

Mr. Smith offers for the purpose of identification note dated [103] June 4, 1909. No objection.

The COURT.—The note may be received for the purpose of identification and marked Defendant’s Exhibit “B.”

Mr. Smith resumes cross-examination. The Court interrogates the witness.

Mr. Smith offers for the purpose of identification a document dated Jan. 15, 1915. No objection.

The COURT.—“The document may be received for the purpose of identification and marked Defendant’s Exhibit ‘C.’ ”

Mr. Smith resumes cross-examination. The Court interrogates the witness. Cross-examination by Mr. Smith resumes.

At this time, to wit, 11:05 A. M., the Court takes a recess for eighteen minutes.

The trial resuming, Mr. Patten takes the stand and cross-examination by Mr. Smith resumes.

Mr. Smith offers for the purpose of identification a document dated Jan. 27, 1911. No objection.

The COURT.—“The document may be received for the purpose of identification and marked Defendant’s Exhibit ‘D.’ ”

The Court interrogates the witness. Cross-examination by Mr. Smith resumes.

Redirect examination by Mr. Russell.

K. Kawasaki, Interpreter.

Kumadiro Hamada (K) called, sworn and examined as a witness for and on behalf of the plaintiff. Direct examination by Mr. Russell.

Mr. Russell offers in evidence lease dated March 20, 1915.

No objection.

The COURT.—“The lease may be received in evidence and marked Plaintiff’s Exhibit ‘C.’ ”

At this time, to wit, 11:55 A. M., this Court continues this cause until 2 P. M., to-day and takes a recess until 1:45 P. M., to-day. [104]

[Title of Court and Cause.]

**Minutes of Court — January 27, 1920 — Trial
(Continued).**

FURTHER TRIAL.

J. W. Russell, Esq., of the firm of Russell & Patterson, appearing as attorney for the plaintiff.

W. H. Smith, Esq., and W. S. Wise, Esq., appearing as attorneys for defendant.

The respective parties being ready, Mr. Russell makes a statement to the Court, relative to a stipulation.

Mr. SMITH.—“It may be stipulated that if the plaintiff is entitled to any portion, she is entitled to one-eighth undivided interest.”

The COURT.—“Let the stipulation appear of record.”

Mr. RUSSELL.—“May that stipulation appear as before we rested?”

Mr. SMITH.—“Yes.”

Mr. RUSSELL.—“We now rest.”

Mr. Smith announces that they are willing to submit the motion for nonsuit without argument.

The Court announces that it is desirous of hearing argument [105] as at the present time there seems to be a good deal of force and effect on the mind of the Court, contained in the second and third ground of the motion for nonsuit.

Mr. Smith announces further that should they submit argument, it would be an argument of considerable length.

The respective parties agreeing, the Court excuses the witnesses now in attendance until tomorrow morning at the hour of ten o'clock.

Mr. Charles H. Swain, Hawaiian interpreter, is also excused until that time.

The COURT.—“Will you gentlemen agree that the motion for nonsuit may be considered as having been read into the record?”

Mr. Smith and Mr. Russell reply in the affirmative.

The COURT.—“Let that appear of record.”

The stenographer is instructed to have the motion for nonsuit made a part of the record.

At this time to wit, 10:10 A. M., Mr. Smith proceeds to argue on the motion for nonsuit.

At 11:04 A. M., the Court takes a recess of twenty-one minutes.

At 11:25 A. M., Mr. Smith resumes his argument.

In the course of his argument, Mr. Smith cites the following authorities: 22 Lawyers' Ed. 378 (381); 42 Iowa, 585; 33 Iowa, 130; 7 La. 95; 62 L. R. A. 872.

At this time, to wit, 11:58 A. M., the Court continues this cause until 2 P. M. to-day and takes a recess until that time.

AFTERNOON SESSION.

L. #671.

FURTHER ARGUMENT ON MOTION FOR NONSUIT.

The respective parties being ready, Mr. Smith resumes his argument.

Mr. Smith cites the following authorities in the course of his argument. 64 L. R. A. 317, Note; Fed. Cases No. 11859; 22 A. & E. Cycl. Law, 1282; 4 Lawyers' Ed. 211 (13); 41 Lawyers' Ed. 225 (229); [106] 17 Cal. 598; 73 Ill. 337 (341); 62 L. R. A. 872; 32 N. J. Eq. 809; Osborn Questioned Documents, 200-204.

At 2:33 P. M., Mr. Smith concludes his argument and submits the motion.

Mr. Russell argues in reply.

At 3 P. M., Mr. Smith argues in reply.

The COURT.—“The Court will take this motion under advisement.”

Court adjourns until to-morrow morning at the hour of ten o'clock. [107]

[Title of Court and Cause.]

**Minutes of Court—January 28, 1920—Trial
(Continued).**

DECISION ON MOTION FOR NONSUIT.

J. W. Russell, Esq., of the firm of Russel & Patterson, appearing as attorney for the plaintiff.

W. H. Smith, Esq., and W. S. Wise, Esq., appearing as attorneys for the defendant.

The Court renders its decision on the motion for a nonsuit. The motion is overruled.

Mr. Smith excepts to the ruling of the Court. The exception is allowed.

Mr. Smith requests that they be allowed an interlocutory bill of exceptions.

The Court grants the request.

The defendant is allowed up to and including Saturday, January 31, 1920, in which to file the interlocutory bill of exceptions.

Charles H. Swain, Hawaiian interpreter, is excused.

At this time the Court takes a recess. [108]

[Title of Court and Cause.]

Minutes of Court—June 17, 1920—Trial (Continued).

J. Lightfoot, Esq., and J. W. Russell and Fred Patterson, Esq., of the firm of Russell & Patterson, appearing as attorneys for the plaintiff.

W. S. Wise, Esq., appearing as attorney for the defendant.

The Court inquires of the counsel for the respective parties as to when they will be ready to go to trial in this case.

Mr. Wise announces to the Court that he is not ready; that Mr. W. H. Smith, co-counsel for the defendant, is now away and that he does not want to have this case go to trial in his absence.

Mr. Wise requests that this case be continued until Mr. Smith's return, or long enough to get a cable for Mr. Smith's return.

The Court makes a statement relative to certain rumors.

Mr. Wise, replying to the Court, announces that this is the first time he has heard such a statement.

The Court announces that the Supreme Court had rendered its decision on the motion for nonsuit and that Mr. Smith did not leave until several days after the decision was rendered.

Mr. Russell announces that he is ready to go to trial, only [109] he wants sufficient time to advise his clients.

Mr. Lightfoot announces that as far as the plaintiff is concerned, he is ready to proceed at the present time, and that in view of the advertisement for sale of some of the Estate of Thomas K. Lalakea, deceased, the case should proceed to trial.

The COURT.—“Mr. Smith was present in the Supreme Court and the present Judge was there and Mr. Smith did not mention anything about this case. He had ample opportunity of interviewing me about this case before he left for the Coast.”

Mr. Wise requests for the privilege of cabling Mr. Smith.

The COURT.—“It seems to me that you are capable of handling this case.”

Mr. Wise replies to the Court.

The COURT.—“I’m not seriously going to consider the continuance of this case because of the absence of Mr. Smith. The Court will try this case, Mr. Wise. I mean the present Judge.”

Mr. LIGHTFOOT.—“May it please the Court, Senator Russell has informed me that as far as he and his associates is concerned, we could go on with this case to-morrow morning.”

Mr. PATTERSON.—“I might say that I was informed by Mr. Wise that this property is worth Sixty Thousand Dollars and the mortgage is for Eight Thousand Dollars.”

Mr. WISE.—“If this case is to be set for trial, at least have it set for trial the early part of the coming week.”

The COURT.—“Law No. 671, Hannah Makainai vs. Solomon K. Lalakea, will be set for trial to-morrow morning at the hour of ten o’clock.”
[110]

[Title of Court and Cause.]

J. Lightfoot, Esq., and J. W. Russell, Esq., and F. Patterson, Esq., of the firm of Russell & Patterson, appearing as attorneys for the plaintiff.

C. S. Carlsmith, Esq., appearing requests that the name of Carlsmith & Rolph, be entered as counsel for Solomon K. Lalakea, defendant in this case.

The COURT.—“Let the name of Carlsmith & Rolph be entered as counsel for Solomon K. Lalakea, defendant, in Law No. 671.”

The COURT.—“Law No. 671, Hannah Makainai vs. Solomon K. Lalakea, may be continued until to-morrow morning at the hour of ten o’clock.”

At this time, to wit, 2:18 P. M. the Court adjourned until to-morrow at ten o’clock, A. M.
[111]

[Title of Court and Cause.]

Minutes of Court—June 24, 1920—Trial (Continued).

TO BE SET FOR TRIAL.

Fred Patterson, Esq., of the firm of Russell & Patterson, appearing as attorney for the plaintiff.

W. S. Wise, Esq., and C. S. Carlsmith, Esq., of

the firm of Carlsmith & Rolph, appearing as attorneys for the defendant.

Mr. Carlsmith makes a statement to the Court relative to the setting of this case for trial and requests that this matter stand over until the first of September.

Mr. Patterson, in reply to counsel, announces that he understood that this case was to follow immediately the trial of the Lalakea-Todd case. Mr. Patterson further announces that this case should be set down for trial for to-morrow morning but that he would like to have Mr. Russell express his opinion on that matter. Mr. Patterson requests that he be permitted to telephone to Mr. Russell. The request is granted.

Mr. Carlsmith makes a reply statement in which he says among other things that if the case is set down for trial to-morrow [112] or in the near future, he shall have to file a motion for continuance supported by affidavits.

Mr. J. W. Russell, co-counsel for the plaintiff, arrives.

For the benefit of Mr. Russell, Mr. Carlsmith gives a *résumé* of what he stated to the Court. Mr. Carlsmith announces that he will not be able to try the case to-morrow.

Mr. Carlsmith further announces that Mr. Wise has been unable to assist him in the case.

Mr. Russell in reply to counsel announces that, if the matter goes over a few days, it will have of necessity to over until September in view of the statute which says that no term cases shall be

tried in July or August; that they have communicated with their clients and that some of them are here in town; and that they are ready to proceed with the case.

The COURT.—“How long do you think it will take to try this case, Mr. Carlsmith?”

Mr. CARLSMITH.—“I don’t know. I should think it would take several days.”

The COURT.—“Law No. 671, Hannah Makainai vs. Solomon K. Lalakea, will be set for trial on Monday, June 28, 1920, at the hour of nine o’clock A. M.”

Mr. Carlsmith announces that at sometime before the trial he will produce a motion for continuance. [113]

[Title of Court and Cause.]

Minutes of Court—June 28, 1920—Trial (Continued).

FURTHER TRIAL.

J. W. Russell, Esq., and Fred Patterson, Esq., of the firm of Russell & Patterson, appearing as attorneys for the plaintiff.

W. S. Wise, Esq., and C. S. Carlsmith, Esq., of the firm of Carlsmith & Rolph, appearing as attorneys for the defendant.

Mr. Carlsmith presents a motion for continuance and with the permission of the Court, reads the same. Mr. Carlsmith makes a statement to the Court and submits the motion.

Mr. Russell makes a statement to the Court in reply to counsel.

The Court makes a statement to counsel relative to the history of the case, and also with regard to certain portions of the affidavit supporting the motion for a continuance.

Mr. Carlsmith announces to the Court that he would like to put W. S. Wise on the stand for the purpose of substantiating certain portions of the affidavit supporting the motion for continuance. The request is granted.

W. S. Wise called, sworn and examined as a witness for and on [114] behalf of the defendant, as to certain portions of the affidavit supporting the motion for a continuance.

Direct examination by Mr. Carlsmith. The Court interrogates the witness.

Direct examination resumes. The Court again interrogates the witness.

Direct examination resumes.

Cross-examination by Mr. Russell.

Redirect examination by Mr. Carlsmith. The Court interrogates the witness. Redirect examination resumes. The Court further interrogates the witness. Further examination by Mr. Carlsmith. The Court interrogates the witness again.

Mr. Carlsmith announces to the Court that if the Court should rule against the motion, there will be only few witnesses and that it will take but one day to finish.

At this time the Court announces that it will take a recess for a few minutes.

The trial resuming, the Court renders its decision overruling the motion for a continuance.

Mr. Carlsmith excepts to the ruling of the Court. Exception allowed.

Mr. Carlsmith announces that the evidence which he has consists practically of two witnesses.

The Court suggest that this matter be continued until 1:30 P. M. to-day.

Counsel for respective parties agree that this matter be continued as suggested.

The COURT.—“Law No. 671 will be continued until 1:30 P. M.”

AFTERNOON SESSION.

The respective parties being ready, Daniel Namahoe called, sworn and examined as a witness for the defendant.

Thomas Pedro, Jr., acts as Hawaiian interpreter. [115]

Direct examination by Mr. Carlsmith.

Mr. Carlsmith shows to the witness a sketch of T. K. Lalakea's former home, which had been drawn by him, and offers the same in evidence. No objection.

The COURT.—“The sketch may be received in evidence and marked Defendant's Exhibit 2.”

Charles H. Swain, heretofore sworn as interpreter in this matter, arrives and acts as such.

Cross-examination by Mr. Russell. The Court interrogates the witness.

Cross-examination resumes.

Redirect examination by Mr. Carlsmith.

Recross-examination by Mr. Russell. The Court interrogates the witness.

At this time, to wit, 2:57 P. M., the Court takes a recess of five minutes.

The trial resuming, Solomon K. Lalakea, defendant, is called, sworn and examined as a witness on his own behalf. Direct examination by Mr. Carlsmith. The Court interrogates the witness.

Direct examination resumes.

Mr. Carlsmith offers in evidence letter from Solomon Lalakea to his father, T. K. Lalakea, dated Jan. 27, 1915, together with the envelope, to which the witness has testified.

Mr. Russell objects to the offer as being immaterial, irrelevant and incompetent.

The COURT.—“The objection is overruled and the letter and the envelope may be received in evidence and marked Defendant’s Exhibit 3 and 4 respectively.”

Mr. Russell excepts to the ruling of the Court. Exception allowed. [116]

The Court interrogates the witness. Direct examination resumes. The Court interrogates the witness. Direct examination resumes. The Court interrogates the witness.

Direct examination resumes.

4 P. M. Cross-examination by Mr. Russell. The Court interrogates the witness. Cross-examination resumes. The court interrogates the witness. Cross-examination resumes.

The Court interrogates the witness. Cross-examination resumes.

The Court interrogates the witness.

Cross-examination resumes, ending at 4:55 P. M.

The Court interrogates the witness.

At this time, to wit, 4:59 P. M., the defendant rests.

Mr. Russell announces that he had intended to call one more witness, O. T. Shipman who is in Kona but will be here to-morrow morning.

The COURT.—“Law No. 671, Hannah Makainai vs. Solomon K. Lalakea, will be continued until to-morrow morning at the hour of nine o'clock at which time we may proceed with the argument.”

At this time, to wit, 5 P. M., Court adjourned until to-morrow morning at the hour of nine o'clock. [117]

[Title of Court and Cause.]

Minutes of Court—June 29, 1920—Trial (Continued).

FOR ARGUMENT.

The respective parties being ready, Mr. Russell announces to the Court that he had intended to call O. T. Shipman this morning but that the said O. T. Shipman, who has been in Kona, had just left there this morning. Mr. Russell further announces to the Court that he has examined the transcript and that he had found the desired testimony already given by the said O. T. Shipman in the early stage of the case and that for that reason the defendant rests.

Mr. Russell argues, citing various authorities.

The Court intimates that it desires briefs filed.

The Court allows Mr. Russell a reasonable time to file his brief and the Court also allows Mr. Carlsmith a reasonable time within which to file his brief after the brief of the plaintiff has been filed. [118]

[Title of Court and Cause.]

Minutes of Court—September 1, 1920—Trial (Continued).

Fred Patterson, appearing for plaintiff.

Carl S. Carlsmith, and W. S. Wise, appearing for defendant.

The Court of its own motion reopens this case in order to hear additional testimony of O. T. Shipman.

Mr. Carlsmith objects and excepts to the order above made to which objection and exception the Court duly allows.

O. T. Shipman called, sworn and examined by the Court.

The calls the witness's to the exhibit in "L. 679" received in evidence June 23, 1920, marked Plaintiff's Exhibit "I," Thomas Pedro, Jr. Clerk. and particularly to pages 150, 151, 152, and 153 under date [119] of March 1st, 1915, to May 19th, 1915, and has the pages above mentioned placed in evidence by the Court and marked exhibits "A3," "B3," "C3" and "D3," to which Mr. Carlsmith notes an exception *with* exception is duly allowed by the Court. [120]

[Title of Court and Cause.]

Minutes of Court—October 25, 1920—Trial (Continued).

Russell and Patterson, attorneys for plaintiff, present in Court.

Carl S. Carlsmith, of the firm of Carlsmith & Rolph, appearing as attorneys for the defendant.

Solomon K. Lalakea also present in court.

The Court informs the parties that it is now ready to take the question of mesne profits.

Mr. Carlsmith informs the Court that an agreement may be arrived at within 24 or 48 hours and that if an agreement between the parties is arrived at a stipulation can then be entered into, with the approval of the Court and the cause is continued. [121]

[Title of Court and Cause.]

Minutes of Court—February 7, 1921—Trial (Continued).

Came on regularly to be heard this day the decision of the Court in the above-entitled cause, J. W. Russell, of the firm of Russell & Patterson, appearing as attorneys for plaintiff and Carl S. Carlsmith, of the firm of Carlsmith & Rolph, appearing as attorneys for defendant, in which decision *judge* was entered in favor of plaintiff and against defendant for an undivided $\frac{1}{8}$ interest in the lands described in plaintiff's amended complaint and

mesne profits in the sum of \$1,575.00 as per stipulation entered into between the parties. Mr. Carlsmith requests until Thursday noon to file written exception to the decision which is granted by the Court. [122]

[Title of Court and Cause.]

Minutes of Court—February 9, 1921—Trial (Continued).

TAXATION BILL OF COSTS.

Russell & Patterson, attorneys for plaintiff.

Carlsmith & Rolph, attorneys for defendant.

The COURT.—“Costs are hereby allowed in the sum of \$23.00, and the item of \$26.10 is hereby disallowed.”

Mr. Russell notes an exception to the disallowance, which exception is allowed. [123]

[Title of Court and Cause.]

Certificate of Clerk of Fourth Circuit Court to Transcript of Record.

I, T. J. Ryan, Clerk of the Fourth Circuit Court, Territory of Hawaii, do hereby certify that the copies of papers, pleadings and documents designated and enumerated below and hereto attached, filed in the above-entitled cause, are true, full, faithful and complete copies of the originals now on file and of record in my office.

That the transcript of evidence (consisting of three parts) is the original as filed in my office.

That the exhibits designated and enumerated below are the original exhibits introduced in evidence in said cause.

All of which constitute my return of a writ of error in said cause issued out of the Supreme Court of the Territory of Hawaii, June 28, 1921.

1. Amended complaint;
2. Answer;
3. Motion to set for trial;
4. Motion for nonsuit;
5. Motion for continuance and affidavit in support thereof;
56. Stipulation;
7. Decision;
8. Judgment;
9. Defendant's exception to decision and findings;
10. Clerk's minutes;
11. Original transcript of evidence.

EXHIBITS.

Plaintiff's Exhibit "A"—Deed—T. K. Lalakea to George Lalakea.

Plaintiff's Exhibit "B"—Deed—T. K. Lalakea to Mrs. Jennie K. Aona, Mrs. Mohihio Hewahewa and Mrs. Hannah Makainai.

Plaintiff's Exhibit "B-1"—Certified Copy—Deed—T. K. Lalakea to Mrs. Hannah Makainai et al.

(Clerk's Certificate.)

(Plaintiff's Exhibits.)

Plaintiff's Exhibit "C"—Lease—T. K. Lalakea to
Hamada Kumadiro.

DEFENDANT'S EXHIBITS.

Defendant's Exhibit 1—Deed—T. K. Lalakea to
Solomon K. Lalakea.

Defendant's Exhibit 2—Lease—T. K. Lalakea to
Fujimoto Nonosaku.

Defendant's Exhibit 2—Sketch drawn in pencil on
yellow paper.

Defendant's Exhibit 3—Lease—T. K. Lalakea to
Tsushima Ikei.

Defendants Exhibit 3—Letter Solomon Lalake
to T. K. Lalakea.

Defendant's Exhibit 4—Envelope addressed to
T. K. Lalakea.

Defendant's Exhibit 4—Lease—T. K. Lalakea to
Joao Martins.

Dated, Hilo, Hawaii, August 15, 1921.

[Seal]

T. J. RYAN,

Clerk, Fourth Circuit Court.

[Indorsed]: No. 1345. Rec'd and filed in the
Supreme Court, August 16, 1921, at 10:20 A. M.
J. A. Thompson, Clerk. [125]

[Title of Court and Cause.]

Transcript of Evidence.

Before His Honor, Judge CLEMENT K. QUINN.
JOSEPH LIGHTFOOT and Messrs. J. W. RUSSELL & F. PATTERSON, for Plaintiff.

W. H. SMITH and W. S. WISE, for Defendant.

Thursday, December 18th, 1919, at 2:00 P. M.

Attorney Lightfoot moved that the names of Messrs. Russell & Patterson, of Hilo, be added to his as counsel for plaintiff.

By the COURT.—Granted.

After reading the complaint, Attorney Lightfoot moved to amend the complaint by excluding, on page 6 thereof, the land described as 21st, to wit:

(21) . . . All that certain tract of land situate at Maonolulu, North Hilo, aforesaid, containing 81 acres, described in R. P. 2320.

By the COURT.—The motion is granted and the description of the property under No. 21 in the complaint may be deleted.

By the COURT.—Is there any desire on the part of counsel to stipulate as to the value of the plaintiff's interest in this land, if it exceeds \$5,000.00, or does it not make any difference?

Attorney LIGHTFOOT.—May it please the Court: in that regard we have had a consultation with my brethren on the other side and on the question of the main profits, and [126]

It is hereby stipulated and agreed by and between the plaintiff and defendant, by their respective counsel, that the value of the thing in controversy in this matter is greater than the sum of five thousand dollars (\$5,000.00).

By the COURT.—Let the stipulation appear on record.

Attorney LIGHTFOOT.—We have arrived at agreements concerning a great number of the matters in this action, which agreements will very materially shorten the hearing up to the present time, and may result in materially saving the time of the Court.

In the first place, your Honor will notice that in the action for judgment we are seeking main profits in the sum of Ten Thousand Dollars (\$10,000.00). Counsel for plaintiff and counsel for defendant have agreed that it would be useless to take up the matter of main profits in case your Honor should find for the defendant, as there would then be no question of main profits concerned in the action. If, however, your Honor should find for the plaintiff we have agreed, subject, of course, to the approval of the Court, that the question of main profits should be taken up at a subsequent date.

So that we are not trying this case before your Honor on the main issue, and if your Honor should find for the defendant that would be the end of it, but if your Honor should find for the plaintiff, then, at a future date to be hereafter set, we could present the question of main profits in another procedure in another part of this same case. I

understand that my brethren on the other side agree to this.

Attorney SMITH.—We agree.

By the COURT.—That meets with the entire approval of [127] the Court, and for the purpose of record at this time, the question of mesne profits at this hearing will not be gone into but in the event that the Court should find for the plaintiff in the present action, the Court will then proceed further to take evidence as to the amount of the main profits.

Attorney LIGHTFOOT.—Further, it has been agreed between ourselves and the counsel on the other side that we should make, for the purpose of shortening the proceedings, certain stipulations as to facts upon which we are all agreed and which it would be only unnecessary waste of time to prove and I would ask my brethren on the other side if he would state to the Court the facts that the defense is willing to admit for that purpose.

Attorney SMITH.—We are willing to admit for the purpose set forth, that T. K. Lalakea, mentioned in the declaration, was in his lifetime and prior to the execution, or alleged execution, or prior to the date of a certain deed, dated March 6th, 1915, which will be offered in evidence by the defense, was seized of the pieces of land named in the declaration; that T. K. Lalakea died intestate on the 7th day of May, 1915; that Hannah Makainai was an heir at law of T. K. Lalakea, deceased. These stipulations are subject to an agreement by counsel for the plaintiff that we may offer in evi-

dence, and that there will be no objection to accepting in evidence, a certain deed purporting to be executed by T. K. Lalakea to Solomon K. Lalakea, bearing date March 6th, 1915, and according to the office of the Registrar of Conveyances in Honolulu, entered upon the 11th day of May, 1915, in Liber 428, pages 122 to 127, and that that deed shall be considered by them as constituting a *prima facie* case upon the part of [128] the defendant.

Attorney LIGHTFOOT.—It is further stipulated that the defendant is in possession of the land.

Attorney SMITH.—I think that may be stipulated, although probably, as a matter of fact, there are certain pieces of land that are not in the possession of the defendant, but I think it may be admitted.

By the COURT.—Let all the stipulations appear on record.

Attorney LIGHTFOOT.—We rest.

Attorney SMITH.—We offer in evidence a document, purporting to be the deed referred to in the stipulation and purporting to be a deed from T. K. Lalakea to Solomon K. Lalakea.

Attorney LIGHTFOOT.—No objection.

By the COURT.—Let the deed offered be received in evidence and marked Defendant's Exhibit No. 1.

Attorney SMITH.—The defense rests.

Testimony of O. T. Shipman, for Plaintiff.

O. T. SHIPMAN (sworn), called by Attorney LIGHTFOOT.

Q. What is your name? A. O. T. Shipman.

Q. Where do you live?

A. In the City of Hilo.

Q. How long have you lived in the City of Hilo?

A. I have lived here continuously for the last eight years.

Q. Did you know Mr. T. K. Lalakea?

A. I knew him very well and acted as his legal advisor for a period of about four years prior to his death.

Q. You are an attorney at law, licensed to practice in all the courts of the Territory of Hawaii?

A. Yes.

Q. And at all the times we have referred to you were such attorney at law? A. Yes.

Q. State whether or not you did a great deal of business for Mr. Lalakea?

A. I think I did nearly all his legal business during the four years prior to his death. Nearly all, not [129] all, but most of it.

Q. And that legal business consisted of the drawing of deeds and mortgages—

A. And leases.

Q. And other instruments? A. Yes.

Q. State whether or not during the time you have mentioned you were a notary public?

A. I was.

(Testimony of O. T. Shipman.)

Q. State whether or not, from time to time, you took acknowledgments of Mr. T. K. Lalakea to instruments? A. I did.

Attorney SMITH.—I don't imagine that the question is of any particular relevancy, but I will object to it.

By the Court.—Objection overruled.

WITNESS.—Yes.

Attorney LIGHTFOOT.—State whether or not you had any conversations with Mr. Lalakea in his lifetime relative to the disposition of his property?

Attorney SMITH.—We object to that as being incompetent, irrelevant and immaterial, as calling for hearsay evidence on the part of the witness, and as not having any possible bearing upon the issues in this case, unless it shall appear, and they will have to make it appear by a primary question, so that by putting this question more direct as to whether at the time of the execution of this deed the witness had any conversation with Mr. T. K. Lalakea in regard to this matter.

By the COURT.—The objection is overruled. Answer the question.

WITNESS.—Yes.

Attorney SMITH.—We note an exception.

Attorney LIGHTFOOT.—When was that conversation? As near as you can recall?

WITNESS.—There had been several conversations between Lalakea [130] and myself regarding the disposition of his property and prior to the execution of the deed in question.

(Testimony of O. T. Shipman.)

Attorney SMITH.—I will move that that be stricken as not in response to the question.

By the COURT.—At this time the motion is denied. I do not know when the answer is completed whether it will be in response to the question or not.

WITNESS.—Finally as a result of these different conversations I drew up and drafted and delivered to Lalakea, some time during the month of December, 1914, about half a dozen different deeds, one of which is the one in question.

Attorney SMITH.—I move that all that portion commencing “as a result” be stricken, as being absolutely not in response to the question.

By the COURT.—The motion to strike is granted.

Attorney LIGHTFOOT.—In consequence of those conversations what, if anything, did you do?

Attorney SMITH.—This is objected to as calling for conclusions on the part of the witness as to the result of the conversations.

Attorney LIGHTFOOT.—I don't think so.

Attorney SMITH.—I will withdraw.

WITNESS.—I drafted, I think, about half a dozen different deeds, covering the disposition of his property, one to Solomon K. Lalakea and another to Mrs. Hannah Makainai and—I have forgotten the names of the others—about half a dozen.

Attorney LIGHTFOOT.—Showing you Defendant's Exhibit No. 1, I will ask you to examine that document and see if it, or any part of it, was one of the deeds that you referred to?

(Testimony of O. T. Shipman.)

WITNESS.—To the best of my recollection that is the identical [131] document that I drafted and delivered to him during the month of December.

Q. In other words, Defendant's Exhibit No. 1, is one of the half a dozen you delivered to him in 1914? A. Yes.

Q. At that time, the date which is in this instrument in ink, was in the instrument or not?

A. It was not.

Q. At the time of the delivery of this instrument to Mr. Lalakea was it signed by anyone?

A. It was not.

Q. At that time, were there any signatures on the instrument as witnesses?

A. There were not.

Q. At that time was there any acknowledgment to the deed? A. There was not.

Attorney LIGHTFOOT.—I call for counsel to produce the other deeds that the witness has referred to.

Attorney SMITH.—Just what are the deeds the witness has referred to? We were not there at the time they were delivered. We decline at the present time to produce deeds upon a call the information contained in which is as vague and indefinite as it is at the present time. He says: "I drew up half a dozen deeds; one of them was to Mrs. Hannah Makainai and to others."

Attorney LIGHTFOOT.—We will call upon you

to produce the definite deed to Mrs. Makainai to which witness has referred.

Attorney SMITH.—What deed is that?

Attorney LIGHTFOOT.—The deed that is referred to in the testimony of the witness as having been drawn and delivered to T. K. Lalakea in December, 1914.

Attorney SMITH.—Personally I don't know anything about that deed. Whether it was a deed that was executed, we have no information as to that.

Attorney LIGHTFOOT.—The deed will speak for itself. I call the Court's attention to the fact that the witness has not testified [132] as to the execution of the deed.

By the COURT.—I understand.

Attorney SMITH.—We do not know. I was not there at the time and do not know whether Solomon K. Lalakea was there at the time those deeds were delivered to T. K. Lalakea by Mr. Shipman.

Attorney LIGHTFOOT.—We submit that if they have that deed to which witness has referred it should be produced in evidence.

By the COURT.—If you have that deed, Mr. Smith, produce it please.

Attorney SMITH.—The deed from T. K. Lalakea to Hannah Makainai?

Attorney LIGHTFOOT.—Yes.

Attorney SMITH.—The defense has no deed in its possession or in the possession of its attorneys,

(Testimony of O. T. Shipman.)

either actually, literally or constructively, which corresponds to the description in any respect.

Attorney LIGHTFOOT.—I understand you to say no?

Attorney SMITH.—No deed to Hannah Makainai.

Attorney LIGHTFOOT (to Witness).—Do you remember the name of any other grantee—named in any of those papers that you drew and gave to Mr. Lalakea in December?

A. There was one to another daughter, Mrs. David Hewahewa.

Attorney LIGHTFOOT.—I would ask the defence to produce the deed to Mrs. Hewahewa, if in their possession.

Attorney SMITH.—We offer the same objections and for the same reasons as before, and submit to the ruling of the Court.

By the COURT.—If you have it, produce it in evidence, please.

Attorney SMITH.—My client informs me that he had not, and has actually or constructively any deed from T. K. Lalakea to Mrs. David Hewahewa.

Attorney LIGHTFOOT (to Witness).—Do you remember the name [133] of any other of those half a dozen instruments?

A. I don't recall the names.

Q. Can you recall the name of George Lalakea and state whether or not one of the deeds was to George Lalakea?

(Testimony of O. T. Shipman.)

Attorney SMITH.—We object to the question as leading.

Attorney LIGHTFOOT.—It is leading, of course.

By the COURT.—Objection overruled.

Attorney SMITH.—We note an exception.

WITNESS.—I cannot recall.

Q. Can you recall, Mr. Shipman, whether one of the deeds you have referred to was to Maria Lalakea as grantee?

Attorney SMITH.—It may be of interest, but we object to this and other questions of the same sort for the reasons previously stated.

By the COURT.—Objection overruled.

Attorney SMITH.—We note an exception.

WITNESS.—I have a faint recollection that that was one of the names, but I would not be positive.

Q. To the best of your recollection?

A. Yes, to the best of my recollection.

Attorney LIGHTFOOT.—I call upon counsel to produce that deed.

Attorney SMITH.—Do you think you have given us sufficient information in the best of witness' recollection. We object to being called upon to introduce that.

By the COURT.—If you have the deed, please produce it in evidence.

Attorney SMITH.—My client states that he has a deed to Maria Lalakea at home and under the

(Testimony of O. T. Shipman.)

order of the Court we will produce it at such time as may be necessary.

Attorney LIGHTFOOT (to Witness).—Do you remember whether one of the deeds you have referred to was to Jennie K. Aona, Mrs. Hewahewa [134] and Hannah Makanai?

A. I feel pretty sure that they were some of them.

Attorney LIGHTFOOT.—I would call upon defendant to produce that deed.

Attorney SMITH.—Defendant has not that one, I can answer right now as his counsel.

Attorney LIGHTFOOT (to Witness).—State whether or not one of the deeds you have referred to was to Mrs. Paahao Kahalo?

A. I don't recall that name.

Q. State whether or not one of the deeds you referred to was to Kanamu Kawaha, Thomas Aiu, Lillie Rose and Jennie Aona?

A. I don't recall that.

Q. Did you have any conversation with Mr. Lalakea after your delivery of the deeds to him relative to the signing of them?

Attorney SMITH.—We object to this question as calling for hearsay testimony, as an attempt to determine the validity or invalidity of the deed and its execution by conversations occurring at other times and places than the time of the execution of the deed.

Attorney LIGHTFOOT.—Your Honor will notice that we do not call for the conversation. We

(Testimony of O. T. Shipman.)

are calling for the fact: was there a conversation relative to the subject, not for the conversation.

By the COURT.—Answer the question.

Attorney SMITH.—I will withdraw.

WITNESS.—I did.

Q. Did you have one or more than one conversations with Mr. Lalakea on that subject? A. I did.

By the COURT.—You mean that you had more than one conversation?

WITNESS.—Yes.

Attorney LIGHTFOOT.—Can you give us about the date of your [135] first conversation with Mr. Lalakea on that subject?

A. It was at the time of the delivery of those different drafts and deeds to him during December, 1914. The exact date I cannot give you, but on the day of the delivery I had a conversation with him.

Q. Can you tell us when you had the next conversation with him on that subject?

A. The first definite date I can fix is January 30th, 1915, that I had a conversation with him on this matter of the execution of these deeds, the signing and acknowledgment. Again, on the 6th day of March, 1915, I had another conversation with him in regard to this matter of signing these deeds.

Q. Will you tell us how you fix that date, the 6th day of March, 1915?

A. I remember it distinctly because it was on a Saturday and I was to leave that afternoon to go on the "Matsonia" to go to Honolulu to meet the

(Testimony of O. T. Shipman.)

Board of Equalization and the boat left at five o'clock in the afternoon, and before going on board I remembered I had about six bits in my clothes and I had to go and get it and that is how I recollect it was the 6th day of March, the early part of March. After I went and returned on the 20th of March, I had another conversation with him on the same subject.

Q. Did you have any further conversations with him, or was that the last?

A. I. had a conversation with him during April but I cannot give you the date. But all together I had four or five; at different times we had conversations about the matter.

Q. In consequence of any of those conversations, state whether or not any instruments were executed and acknowledged by Mr. Lalakea before you?

Attorney SMITH.—This is objected to on the general grounds [136] of being incompetent, irrelevant and immaterial, and more specifically because it does not refer to the deed under which we claim and that it does not appear to refer to any of the other instruments that have any bearing on this case. A notary public may at many times take acknowledgments, but unless the instruments has reference to the instrument now in question it is absolutely irrelevant.

Attorney LIGHTFOOT.—I will withdraw the last question if the Court will allow me and propound another in its stead. In consequence of any of the conversations that you have referred to state

(Testimony of O. T. Shipman.)

whether or not the deed, Defendant's Exhibit No. 1, was ever executed and acknowledged by Mr. Lalakea in your presence?

Attorney SMITH.—This is objected to, as the instrument itself is the best evidence. It can be shown by the instrument or not at all.

By the COURT.—You may answer the question, Mr. Shipman.

Attorney SMITH.—We note an exception.

WITNESS.—I can answer no.

Attorney LIGHTFOOT.—In consequence of any of the conversations which you have referred to were any of the other instruments drawn by you and given to Mr. Lalakea in December, 1914, executed and acknowledged by Mr. Lalakea before you?

Attorney SMITH.—This is objected to and more strongly on the grounds that the instruments are the best evidence, and oral evidence as to whether they were acknowledged only when it appears that the instruments themselves cannot be introduced.

By the COURT.—What bearing would the acknowledgment of the other instruments have in the case?

Attorney SMITH.—I don't know, but sometimes questions which appear to have no bearing do so.

By the COURT.—Answer the question. [137]

Attorney SMITH.—We note an exception.

WITNESS.—No.

Attorney LIGHTFOOT.—Do you know Mr. Solomon Lalakea?

(Testimony of O. T. Shipman.)

WITNESS.—I do.

Q. Did you ever have any conversations with Mr. Solomon Lalakea relative to the deeds that you have referred to?

Attorney SMITH.—This is objected to, unless it is concerning the deed in question.

By the COURT.—I think so.

Attorney LIGHTFOOT.—I withdraw the question. (To Witness.) Did you have at any time a conversation with Mr. Solomon Lalakea in reference to the deed, Defendant's Exhibit No. 1?

Attorney SMITH.—After the execution?

Attorney LIGHTFOOT.—After the alleged execution?

WITNESS.—Yes.

Q. Where was that conversation?

A. In my office.

Q. Can you fix the date of that conversation?

A. It was about noontime of the day that Mr. Lalakea died. He came into my office in a big fuss and wanted me to come right away to Lalakea's residence, stating that he was in pilikia, in a bad way, and wanted me to go over right away and go over to see about these deeds, these half a dozen deeds I had originally drafted and delivered to T. K. Lalakea. I asked him if Mr. Lalakea was conscious, to know what he was doing. He did not think he was. Solomon did not think he was really conscious. I said, "It is no use for me to go, I

(Testimony of O. T. Shipman.)

couldn't do anything for you; it is too late." On that Solomon went out and I don't think it was more than ten minutes later than that that a man and his wife, who had just come from Lalakea's house, came in and said he had just died. Mr. T. K. Lalakea had told me—

Attorney LIGHTFOOT.—Stop there. At the time you referred to when this conversation took place in your office, do you remember [138] if Mr. Solomon Lalakea had anything in his hands?

WITNESS.—I don't recall that.

Q. You don't recollect that? A. No.

Q. He was alone, I take it?

A. Yes, and in a great hurry. I can't recollect whether he had any documents in his hands or not.

Q. And immediately upon your saying that you could not take these acknowledgments he left your office? A. Yes.

Attorney SMITH.—Counsel is injecting into his question something that the witness did not say at all.

By the COURT.—What was that?

Attorney SMITH.—“Immediately upon your saying you could not take these acknowledgments he left your office.” The answer of the witness says nothing in regard to acknowledgments or with reference to them, and I move that the answer be stricken and object to the question.

Attorney LIGHTFOOT.—I did not intend to ask a misleading question, may it please the Court. My understanding was that the witness testified

(Testimony of O. T. Shipman.)

that he could not take any acknowledgments as it was too late.

By the COURT.—The objection is sustained.

Attorney LIGHTFOOT.—I was in error in supposing that the witness used the word “acknowledgments.” (To Witness.) Immediately after you had told Mr. Solomon Lalakea, on the occasion that you have referred to, that you could do nothing for him, he left your office? A. Yes.

Q. And you didn’t have any further conversation with him regarding the matter? A. No.

Q. Have you told us everything you can recall about that conversation with Solomon Lalakea on that occasion?

A. Well, the purpose of Solomon coming to me, I understand— [139]

Attorney SMITH.—I object to witness’ understanding and move to strike it out.

By the COURT.—The motion is granted. Answer the question, witness.

WITNESS.—I could tell you more, but you don’t want to listen. I could tell you more.

Attorney LIGHTFOOT.—Tell us everything that Solomon said, the whole conversation, as far as you can remember? Not necessarily in the exact words—

Attorney SMITH.—I object to the priming of this witness in this way. He has already stated and purported to tell what took place between himself and Solomon Lalakea, and for that purpose he gave the language of it, saying that “father

(Testimony of O. T. Shipman.)

was in pilikia," and that thereafter, or immediately thereafter, Solomon left the office and he has not claimed to have anything else in his mind. Now, I can see very clearly and the Court can see very clearly, that there is something else that counsel would like to have, and there is danger if we get it it will be rather the inference or opinion of the witness and nothing stated by Solomon Lalakea to this witness. I object very strongly to this question on the ground that it is leading; it is suggestive to the witness.

By the COURT.—The objection is sustained. That is the ruling of the Court. I think it is objectionable on the ground that he has answered and, in fact, you are asking him to go over the entire ground again. The Court cannot legally prevent you from asking him; "Have you told me everything that happened?" and if he answered in the negative, then to ask him what else transpired.

Attorney LIGHTFOOT.—The witness gave a portion of the conversation and this is requesting him if he would give us any other conversation and I think it is right. I raise a constitutional objection to being accused of priming. [140]

Attorney LIGHTFOOT.—Have you told us everything that transpired?

WITNESS.—I have not.

Q. Will you tell us what else transpired on that occasion?

(Testimony of O. T. Shipman.)

A. In addition to what I have already told you, Mr. Solomon Lalakea wished me to come right away. Whether he said to have the old man sign and take his acknowledgment, or simply to take his acknowledgment, I cannot tell you. It may have been, but I know there was acknowledgments in connection with the matter and that was the reason he came for me.

Attorney SMITH.—I move the answer be stricken. If there was ever an inference of this kind, we think it is drawn here and the Court can see it in connection with the previous statements of this witness.

By the COURT.—The motion to strike is granted, without prejudice to counsel to elicit further information as to conversations which took place.

Attorney LIGHTFOOT.—Was the word “acknowledgment” used as far as you can remember?

Attorney SMITH.—We object.

By the COURT.—The objection is sustained.

Attorney LIGHTFOOT.—Will you give us any further conversation between yourself and Solomon Lalakea on that occasion, which you can remember?

WITNESS.—I cannot give you the exact language, the idea was—

Attorney SMITH.—I move to strike.

By the COURT.—The motion is granted.

Attorney LIGHTFOOT.—Will you give us the substance of what was said?

(Testimony of O. T. Shipman.)

Attorney SMITH.—Witness has already stated the substance and we claim the whole. [141]

By the COURT.—Can you not give us the exact language used by Solomon Lalakea on that occasion?

WITNESS.—I cannot give you the exact language; it would be impossible. He came there in a hurry and wanted me to come right away to his father's house to fix up these documents. Whether he told me to simply take the old gentleman's acknowledgment, or to see they were properly signed and acknowledged, I cannot say.

By the COURT.—That is exactly what the Court is asking: Did Solomon Lalakea say: "I want you to come over to take the old gentleman's acknowledgment," or did he say: "I want you to come over and secure the old man's signature and take his acknowledgment," or was it one thing or the other?

WITNESS.—I can swear positively that he did say "to come over and take the old man's acknowledgment." I can testify to that.

By the COURT.—In connection with what?

A. To those deeds which I had drafted at his orders and delivered during the month of December.

Attorney LIGHTFOOT.—You have seen Mr. Lalakea write his name, have you?

WITNESS.—Yes.

Q. Many times? A. Yes.

(Testimony of O. T. Shipman.)

Q. Calling your attention to the signature of T. K. Lalakea on Defendant's Exhibit No. 1, I would ask you to examine that and state whether or not in your opinion it is the signature of T. K. Lalakea?

Attorney SMITH.—I want to cross-examine the witness a little in regard to that, if the Court please. Can you state how long prior to the 6th day of March, 1915, was the last time you saw T. K. Lalakea sign his name to an instrument?

WITNESS.—I cannot recall just how long.

By the COURT.—Well, give us your best judgment?

WITNESS.—It was hardly a week but what I saw him sign his [142] name to some document or other. It might have been a couple of weeks, probably within that time I had seen him sign his name.

Attorney SMITH.—You are certain it was not more than one month?

WITNESS.—Not more than one month.

By the COURT.—T. K. Lalakea was the former Treasurer of the County of Hawaii?

WITNESS.—Yes.

Q. Now, as Treasurer of the County of Hawaii, did you see his signature many times? A. I did.

Q. And in that way familiarized yourself with it? A. Yes.

Q. Becoming more familiar as the years went by and you became his legal advisor? A. Yes.

(Testimony of O. T. Shipman.)

Q. You say that you witnessed his signature, that you saw him sign his name to documents from time to time, as frequently as once or twice a month during the period up to the time of his death?

A. I think it would average that much. I know it continued for over a period of four years and very frequently I saw him sign and execute documents and leases.

Attorney SMITH.—How long before the 6th of March, 1915, was the last time that you took the acknowledgment of T. K. Lalakea?

WITNESS.—I cannot tell you without reference to my records.

Q. Where are your records?

A. I think they are in my office.

Q. Will you bring them up at some time later on?

A. Yes.

Attorney LIGHTFOOT.—Will you examine the purported signature of T. K. Lalakea and state whether or not in your opinion it is the signature of T. K. Lalakea?

WITNESS.—It does not look just right to me.

Attorney SMITH.—I move to strike the answer.

By the COURT.—It is granted.

WITNESS.—In my opinion it is not.

Attorney LIGHTFOOT.—You may cross-examine, Gentlemen. [143]

Upon resuming, at 3:20 P. M., on December 18, 1919, O. T. Shipman returned to the witness-stand:

Attorney SMITH.—You have your notary book for 1915? A. I have.

(Testimony of O. T. Shipman.)

Q. When does that show the date of the last acknowledgment was.

A. The last acknowledgment prior to 6th of March was January 25, 191⁵~~2~~.

Attorney LIGHTFOOT.—Prior to the 6th of March?

WITNESS.—Yes?

Attorney LIGHTFOOT.—I would ask leave to ask another question on that same subject at this time. When was the very last acknowledgment of Mr. Lalakea? What was the date?

WITNESS.—March 20th, 1915.

Attorney LIGHTFOOT.—That is all. I wished to get it in evidence that the very last acknowledgment was after March 6th, 1915, showing his acquaintance with the signature right up to March 20th.

Attorney SMITH.—You stated that in your opinion this signature upon Exhibit No. 1 was not the signature of T. K. Lalakea. Will you give the reasons why?

WITNESS.—Well, the only reasons I can give offhand are that it looks a little too good for the old gentleman's signature. The letters are rather smoother than what I have been accustomed to see in the old man's signature. It does not look right to me for those reasons.

By the COURT.—The acknowledgment on the 20th of March, 1915. What was that?

WITNESS.—I think to a lease, if I am not mistaken, made and executed between T. K. Lalakea

(Testimony of O. T. Shipman.)

and a Japanese, I think. No, a Portuguese, Manuel Miguel, Junior. It was land at Pokolua.

By the COURT.—Have you any chance of securing that signature?

WITNESS.—I would have to get that document.
[144]

Attorney SMITH.—Does he live in town?

WITNESS.—I don't even know.

Attorney SMITH.—The one in January, was that to him?

WITNESS.—That is the one I refer to.

Attorney SMITH.—Then the one on March 20th?

WITNESS.—That is a land lease to a Japanese, Hamada Kumodiro, at Kaiwiki.

By the COURT.—Do you know the term of that lease?

WITNESS.—Yes. Ten years at \$5.50 an acre per annum.

By the COURT.—I take it that could be obtained?

WITNESS.—Yes. Probably both of them.

Attorney SMITH.—I will show you a document, Mr. Shipman, purporting to bear the signature of T. K. Lalakea and ask you whether you consider that his signature?

WITNESS.—That is his signature. I am positive of that.

Q. In what way?

A. The document is dated November 30, 1913, I don't know the document.

(Testimony of O. T. Shipman.)

Attorney SMITH.—I simply showed him the signature.

WITNESS.—The signature, that is all.

Attorney LIGHTFOOT.—You are going to offer that in evidence?

Attorney SMITH.—Yes. (To Witness.) You consider that is not as well written a signature as the one in our Exhibit No. 1?

WITNESS.—Yes. That looks the older. Looks a little too smooth to me.

Attorney SMITH.—You think this smoother than the one I have just showed you?

WITNESS.—Yes. I do.

Attorney SMITH.—I offer that in evidence.

WITNESS.—The old gentleman was ill and shaky. But I am so familiar with his signature, I can tell right off. I am positive that is his signature.

Attorney SMITH.—Is there any other reason why you would say this is the signature of T. K. Lalakea and the signature on Exhibit [145] No. 1 is not the signature of T. K. Lalakea, except your statement that you consider the one I have just showed to you is not as smoothly written?

WITNESS.—That is the principal reason. One is the signature. In the other the lettering is not just right; not just the right size. There is a difference as to size.

Attorney SMITH.—I thought you said it was better than he was accustomed to write?

WITNESS.—I think it is smoother than what

(Testimony of O. T. Shipman.)

the old gentleman was in the habit of writing, and the lettering is smaller and finer than what he usually uses.

Attorney SMITH.—I will offer this as Defendant's Exhibit No. 2.

Attorney LIGHTFOOT.—No objection.

Attorney SMITH.—I will show you another and ask you if you consider that to be T. K. Lalakea's signature. Please look at it without looking at the other portions of the deed?

WITNESS.—Yes, that is his signature.

Q. In what respect does that differ from our Exhibit No. 1?

A. The same reasons as already given on the others.

Attorney SMITH.—I offer this in evidence as Defendant's Exhibit No. 3.

By the COURT.—It is so ordered.

Attorney SMITH.—Will you state whether you think the one I now show you is the signature of T. K. Lalakea?

WITNESS.—That is his signature.

Q. And why do you consider that is his signature?

A. Because I am so familiar with it, I know it is his signature.

Q. Doesn't it differ quite a little from the one I last showed to you. A. Well, there is—

Q. I will call your attention to the way in which the letter "L" is written and ask you whether this

(Testimony of O. T. Shipman.)

one, which will be our Exhibit No. 4, does not differ decidedly from our Exhibit No. 3? [146]

A. There is a little difference.

Q. Are they not, as a matter of fact, made in an entirely different way? Are not the starting point and the ending point of the letter in an entirely different style of writing?

A. There is a little difference, but I note this is written back in 1905, while the signatures I am familiar with are since the year 1912. While there is a little difference in the two signatures, still they appear to be the same, as having been made by the same party.

Q. You express no doubt about that made in 1905, that was his signature? A. I have no doubt.

Attorney SMITH.—I offer this in evidence as Defendant's Exhibit No. 4.

By the COURT.—It is so ordered.

Attorney SMITH.—I think that is all.

Attorney LIGHTFOOT.—That is all.

Testimony of Mrs. David Hewahewa, for Plaintiff.

Mrs. DAVID HEWAHEWA, called by Attorney Lightfoot.

Charles Swain sworn in as interpreter.

Attorney LIGHTFOOT.—You are the daughter of Thomas K. Lalakea, now deceased?

WITNESS.—Yes.

Q. Where do you live? A. Wainaku.

Q. In May, 1915, where were you living?

A. At the house of my father.

(Testimony of Mrs. David Hewahewa.)

Q. On the 7th of May, 1915, were you residing in the house of your father? A. Yes.

Q. And what event occurred on that day?

A. My father died on that day.

Q. Where is the house of your father, in Hilo?

A. It is down here in town.

Q. Prior to the death of your father, how long had you been living [147] in your father's house?

A. Two weeks and more.

Q. Who, if anyone, was living with you during those two weeks?

A. My younger sister, Hannah, and them.

Q. What is the name of your younger sister?

A. Hannah Makainai.

Q. She is the plaintiff in this case? A. Yes.

Q. Besides your younger sister, who was living in that house? A. Solomon.

Q. Anyone else? A. My husband.

Q. By Solomon do you mean Solomon Lalakea?

A. Yes, Solomon Lalakea.

Q. There was also living there the husband of Hannah Makainai? A. Yes.

Q. What is his name? A. Makunhe.

Q. And the old gentleman was living in the same house, was he? A. Yes.

Q. How did you come to go and live at Mr. Lalakea's house?

A. —

Q. About two weeks before his death?

Attorney SMITH objected.

(Testimony of Mrs. David Hewahewa.)

Attorney LIGHTFOOT.—It is merely introductory, if the Court pleases.

Attorney SMITH.—This question is either of importance or no importance of itself and if it is of importance we consider it irrelevant. The question at issue, if the Court please, is the execution of a deed, and the point of coming to live at this house two weeks before has nothing to do with the execution of this deed.

Attorney LIGHTFOOT.—I withdraw the question. (To Witness.) On the date of your father's death all those people you have mentioned were living in that house, were they?

WITNESS.—At the time of his death?

Attorney LIGHTFOOT.—On the date of his death?

A. On the day of his death we were there but at the time of his death Solomon [148] and them were not there.

Q. What time did your father die, what time of the day?

A. After one o'clock.

Q. In the afternoon? A. Yes.

Q. Who was present at the time of his death?

A. Myself and my sister, Mrs. Makainai.

Q. Where was Solomon, if you know, at that time? A. He had gone to the doctor.

Q. What time did Solomon go for the doctor?

A. It was after he had his meal at 12 o'clock.

Q. After he had gone out to get the doctor, having

(Testimony of Mrs. David Hewahewa.)

had his meal, did Solomon return before your father died? A. No, when he returned he was dead.

Q. How long had your father been dead when Solomon returned?

A. It was after one o'clock when he died. It was then they went after Solomon.

Q. You cannot tell how long after one o'clock it was when Solomon came back to the house, can you? A. Probably two o'clock.

Q. When Solomon came back to the house what part of the house were you in?

A. I was away at the back.

Q. Did you hear him return to the house?

A. Yes, I heard the noise of his feet.

Q. Where was Hannah at that time?

A. Hannah had left and gone out into the sitting-room.

Q. That is near the front verandah, is it? A. Yes.

Q. What did Solomon say when he returned to the house on that occasion?

A. I heard him say: "Shut up." And Hannah was speaking to him. She said, "Papa has gone," and he said "Shut up." I was back and I could hear him speaking.

Q. Did Solomon then come into the house?

A. He came into the house, to the front part of the house. I could hear him in [149] the front. I could hear his shoes.

Q. In what part of the house was your father's dead body then lying?

A. At the rear, that was where I was.

(Testimony of Mrs. David Hewahewa.)

Q. What room was that?

A. It was the room furthest back; from there we came into the sitting-room.

Q. And what had that room been used for?

A. The sitting-room was at one part and a bedroom at the other.

Q. Whose bedroom was the body of your father lying in?

A. It was the room used by anyone; the room in front of that was his own one.

Q. This room where your father was lying dead, was it your father's bedroom, or was it some one else's bedroom? A. It was everybody's.

Q. When Solomon entered the house, what did he first do?

A. I heard him making a noise in the room of our father.

Q. Which room do you refer to as the room of your father?

A. It is the front room I am speaking of. The sitting-room is at one side and this room adjoining.

Q. Was the room you are referring to a bedroom?

A. It is a bedroom used by all.

Q. And next to the sitting-room?

A. This rear room is the room that is used by anyone. That is where he was lying. But the front room, that is his own bedroom, and that adjoins the sitting-room.

Q. Now, then, you say you were in the back room where your father's remains were and you heard

(Testimony of Mrs. David Hewahewa.)

Solomon make a noise. Where was Solomon when he was making that noise?

A. It was the room of our father.

Q. What was Solomon doing, if you know?

A. I don't know what he did, but I saw him coming out with a bundle of papers into the room he was lying. [150]

Q. Now, you say he had some papers. Can you describe the papers he had?

A. He came into the room that was about from here to there where there was a bureau. I saw him go and take out a towel and wrap up the bundle of papers he had. Some of the papers were white and some were blue.

Q. But you cannot tell us anything further about these papers than that they were in a bundle and some were white and some were blue: is that right?

A. Yes.

Q. After wrapping these papers in a towel, what did he do with the papers?

A. He then looked at our father who was lying there and went out.

Q. Where did he get the towel he put around the papers? A. It was lying on the bureau.

Q. In the same room that your father was lying; is that right? A. Yes.

Q. How long did Solomon stay in the room where his father was lying?

A. Not very long. A very few minutes.

Q. And then what did he do?

(Testimony of Mrs. David Hewahewa.)

A. He looked at our father and walked out and went away.

Q. And you don't know where he went, do you? That is of your own knowledge? A. No.

Q. In the room where Solomon first went into and where you heard him making a noise, what furniture is there? A. There is a bureau there.

Q. Any bed? A. Yes.

Q. What else? A. That is all.

Q. This bureau that you speak of, will you try and describe to the Court, what kind of a bureau it was?

A. It is made of wood. The lower parts clothes are left in and some drawers have books. The upper part also has books.

Q. The upper part, was that open or closed in with drawers? [151]

A. Open. The lower part is open.

Q. Now, the upper part?

A. The upper part is locked, is closed.

Q. Did it have a lock on it?

A. That bureau, that drawer is always locked with a key.

Q. Who kept the key to that bureau?

A. Those weeks I was there, Solomon had it.

Q. Before you lived there, do you know who kept the key?

Attorney SMITH.—This is objected to as irrelevant, incompetent and immaterial.

(Testimony of Mrs. David Hewahewa.)

Attorney LIGHTFOOT.—I submit it is material to show that prior to his last illness, Mr. T. K. Lalakea had control over this upper bureau, or safe, or whatever it was, and to that extent we wish to show, by this witness, if we can, who was in the habit of keeping the key to this bureau. However, I withdraw the question. (To Witness.) Before you went to live at your father's house, were you in the habit of visiting that house? A. Yes.

Q. Frequently or seldom?

A. Sometimes I would go and spend the night, sleep there, get up in the morning and go back.

Q. How many times a week about would you go to that house?

A. Two times, sometimes three times.

Q. And that was so up to the time that you went to live there, was it? A. Yes.

Q. Before you went to live there, had you seen the key to this bureau?

A. Yes, it was in father's possession.

Q. Did you see it frequently? A. Yes.

Q. And whenever you saw it, where was it?

A. When I went there to stay, Solomon had it.

Q. Before that time?

A. Before that time Papa had it.

Q. Where did he keep it as a rule?

A. In his pocket.

Q. Have you ever seen your father give that key to anyone before you went to live in the house?

A. No. [152]

(Testimony of Mrs. David Hewahewa.)

Q. What was kept in that bureau?

A. Lots of papers, clothes and money.

Q. Whose clothes? A. His clothes.

Q. Whose? Your father's? A. Yes.

Q. Where were the clothes kept?

A. In that bureau.

Q. And inside of the doors that locked? Is that right? A. Yes.

Q. What else was kept in that bureau?

A. Bedspreads.

Q. What part of the bureau were the bedspreads in? A. At the lower part.

Q. And not under lock and key? A. No.

Q. You say there was money kept in that bureau, whose money?

A. Maybe his, I don't know whose money was kept there.

Q. Do you know whose papers and books were kept in there?

A. I have seen, I saw books and papers there, but I don't know to whom they belong.

Q. Did your brother Solomon have any books or papers there?

Attorney SMITH.—I object to this question.

By the COURT.—The objection is sustained.

Attorney LIGHTFOOT.—I note an exception.

Attorney LIGHTFOOT.—(To Witness.) Did you have any means of knowing if Solomon had any books or papers in that house? A. I don't know.

Q. And you don't know of any places where

(Testimony of Mrs. David Hewahewa.)

Solomon kept books or papers in that house, do you?

A. I have seen him in another room where he did some writing on a table. He had things there.

Q. Which other room have you seen Solomon write in? A. The dining-room.

Q. And you say he kept some things there? What kind of things? [153]

WITNESS.—On the table.

Q. Well, what kind of things was it Solomon kept there on the table? A. Papers.

Q. What was that table? A desk or the dining-table? What was it?

A. A writing-desk, back of the door.

A. That is in the room on the Waiakea side of the house, was it? A. Yes.

Q. Did you ever see Solomon put his things, papers and books, in this bureau that you have referred to? A. No.

Q. Did your father ever deliver a deed of property to you?

Attorney SMITH.—We object to this as incompetent, irrelevant and immaterial, and as having nothing to do with the issues of this case.

Attorney LIGHTFOOT.—I submit it is extremely relevant to this case. We wish to show that there was a purported deed to this witness, purporting to be signed on March 6th, that she has never received any such deed from her father. That going into the question of the delivery of Defendant's Exhibit No. 1 to Solomon Lalakea.

(Testimony of Mrs. David Hewahewa.)

By the COURT.—The objection is overruled.

Attorney SMITH.—We note an exception.

WITNESS.—No.

Q. Did Solomon ever give you a deed purporting to have been executed by your father? A. Yes.

Q. Was that an original deed, or was it a copy of the deed that Solomon gave to you?

Attorney SMITH.—We object on the grounds that whatever she has is the best evidence of whether it is the original or a copy.

Attorney LIGHTFOOT.—I submit that I should be permitted to show that she did receive a copy of a deed and I will forward a [154] certified copy of that deed from Honolulu hereafter and get it up. (To Witness.) Have you the deed that Solomon, your brother, gave to you?

A. Yes, I had it and I wrote on it the day it was received by me, prior to the death of my father.

Q. And what did you do with that deed?

A. It is still at home; I have not done anything with it.

Q. At home, here in Hilo? A. Yes.

Q. Will you produce that deed when next you take the stand, please?

Attorney SMITH.—May I ask here about that “prior”? This was delivered prior to the death of her father? Is that what she said?

Attorney LIGHTFOOT (to Witness).—When was it that Solomon gave the deed to you?

A. It was long after the death of our father. About two years after that.

(Testimony of Mrs. David Hewahewa.)

By the COURT.—Mr. Lightfoot asked you a moment ago, whether or not you have the deed that Solomon gave to you and you answered by stating “Yes, that you had the deed and you wrote on the deed the date of receiving it and it was prior to your father’s death.” Do you want to correct that statement?

WITNESS.—I did not write on that deed that he gave to me.

Attorney LIGHTFOOT.—When was it that Solomon gave you that deed? Was it before your father’s death or after your father’s death?

WITNESS.—Our father had died. It was after that, perhaps two years.

Attorney LIGHTFOOT.—You may cross-examine.

Attorney SMITH.—It is understood that she will bring up this deed?

Attorney LIGHTFOOT.—Yes, subject to the bringing in of that deed. And I may then further examine on the deed.

By the COURT.—That is the understanding.

By the COURT (To Witness).—Are you older or younger than [155] your brother Solomon?

A. I am the eldest of us.

Q. How old are you? A. 42.

Q. How old is Solomon?

A. 30 and over I believe.

Q. Where are you living, at Wainaku?

A. Yes.

(Testimony of Mrs. David Hewahewa.)

Attorney SMITH.—Was your father sick all the time you were there? Those last two weeks you speak of?

WITNESS.—Yes, that was when he was very sick.

By the COURT.—How old was your father?

A. 60 and over.

Attorney SMITH.—And that was the reason you went to stay at the house, because he was sick?

A. Yes.

Q. You don't know as a matter of fact whether Solomon kept papers in this locked desk, or bureau, along with your father's papers, or not, do you?

A. No.

By the COURT.—Is the original deed in the possession of the witness?

A. No, your Honor. Never in her possession.

By the COURT.—The Court is very anxious that this deed, the original deed, be produced.

Attorney LIGHTFOOT.—I have called for the original deed. We claim that Solomon has that.

Attorney SMITH.—I will state to the Court what I understand to be the case. I understand that one of the deeds spoken of had three grantees, Mrs. Makainai, Mrs. Hewahewa and Mrs. Aona, and that it was delivered to Mrs. Aona, and as far as I know we can produce it in the morning.

By the COURT.—It is on account of the comparison of the signatures.

Attorney LIGHTFOOT.—Have you any information as to the other deeds?

(Testimony of Mrs. Hannah Makainai.)

Attorney SMITH.—We have a deed to George Lalakea. It was not asked for, so I did not produce it.

Attorney LIGHTFOOT.—Will you now furnish the deed to George [156] Lalakea, so that I can put it in on our case.

(This was done.)

Attorney LIGHTFOOT.—I offer in evidence this deed to George Lalakea, being a deed alleged to have been executed on the 6th day of March, 1915, and containing the alleged signature of T. K. Lalakea.

By the COURT.—The deed is received in evidence and marked Plaintiff's Exhibit "A."

Testimony of Mrs. Hannah Makainai, for Plaintiff.

Mrs. HANNAH MAKAINAI was sworn as witness.

(Examined by Attorney LIGHTFOOT.)

Q. What is your name?

A. Hannah Makainai.

Q. You are the plaintiff in this action, are you?

A. Yes.

Q. Where do you live?

A. I am now residing on the homestead.

By the COURT.—Waiakea?

WITNESS.—Papaaloa.

Attorney LIGHTFOOT.—Where do you live when you are in Hilo?

A. At the house of Lalakea, our father.

Q. Where is that? What street is it on?

(Testimony of Mrs. Hannah Makainai.)

A. Formerly, I knew the street by the name of Bridge Street. That is the street that runs up to the Volcano.

Q. When did you go to live on your homestead at Papaaloa? A. Last year past.

Q. And before going to Papaaloa, where did you live? A. At Lalakeas' our father's house.

Q. And how long did you live at the house of Lalakaa, before going to the homestead?

A. Several years. If I am not mistaken, over eight years.

Q. When your father died, where were you living?

A. At the place of the death of my father.

Q. And how long had you been living there then?

A. From that time to long before the time of his illness. [157]

Q. Did your father always live with you in that house, the Hilo house?

A. Yes, he lived there after he took ill in the year of 1914.

Q. Before he took ill, where did he live?

A. At one of our residences, out in the suburbs.

Q. And what part of 1914 did he come to live with you in Hilo? What month was it?

A. In August.

Q. And in August, 1914, he was ill, you say?

A. Yes.

Q. Did he go round town, walk about, or was he confined to the house when he came to you in August, 1914?

(Testimony of Mrs. Hannah Makainai.)

A. Sometimes he would go out with me. I took him out, exercised him.

Q. Did he go out every day? A. No.

Q. The year your father came to live with you in the Hilo house in August, 1914, who else was living there at the Hilo house? A. My husband.

Q. Anyone else? A. Afterwards?

Q. Afterwards who came there?

A. The grandchild.

Q. Who else? A. Her husband.

Q. Who else? A. That is all.

Q. Didn't Solomon ever come to live there?

A. He did not come then.

Q. Didn't Solomon live with you there in the Hilo house at any time? A. He lived there.

Q. When did Solomon come to live there?

A. In August.

Q. Of what year? A. In the same year.

Q. Now, just think a little. When was it that Solomon came to live in the Hilo house? I withdraw that. Was Solomon living there with you at the time the old gentleman came to live with you, in August, 1914?

A. I think I made a mistake in the statement I made. [158]

Q. In August, 1914, where was Solomon living?

A. Yes, he was in Honolulu.

Q. Now, can you remember when Solomon left Honolulu and came to live in Hilo?

A. I cannot remember.

(Testimony of Mrs. Hannah Makainai.)

Q. Was it some months after your father came to live with you?

A. Yes, it was some time afterwards. It was through my husband requesting him to come.

Q. How long before the old gentleman died was it that Solomon came to live in the Hilo house?

A. A month and over.

Q. How many rooms are there in the Hilo house?

A. Six, in all.

Q. Is there a verandah? A. Yes, at the front.

Q. What are these six rooms?

A. A hallway which is used as a sleeping room by the family. A bedroom, used by our father.

Q. Where is the bedroom that was used by your father?

A. The room of our father was like this: There was a portion starting from the hallway that was used by the folks when they came.

Q. Which part of the house was it? On the Hamakua side or the Waiakea side?

A. On the Hamakua side.

Q. Was it the end room?

A. Yes, in the front.

Q. You have referred to the room occupied by your father: Was that in front of the house or in the back of the house?

A. At the front his bedroom was.

Q. There was a bed in that room, was there?

A. Yes.

Q. What else was there?

A. A standing bureau where clothes were put.

(Testimony of Mrs. Hannah Makainai.)

Q. That bureau, did it have any doors to it?

A. Two doors, which were locked and if you unlocked it they would open.

Q. Did it have anything besides the places covered by two doors?

A. Nothing else other than shelves at the lower part of this bureau.

Q. In the lower part of this bureau, what was kept? A. Bedspreads, pillow-cases. [159]

Q. And these were not locked up, I understand?

A. Yes.

Q. Now, the part above that, where the doors were and the key, was that part kept locked always, or was it open?

A. No, these doors were always kept locked.

Q. Who kept the key in August, 1914, when your father first came there, who kept the key to that bureau? A. He kept it.

Q. That is, your father? A. Yes.

Q. Where did your father keep the key of that bureau?

A. He kept it in his pants, in which he slept.

Q. Did he always keep the key with him?

A. He kept the key and always had it, until I think a week after our father died I then saw our brother had it.

Q. The week after your father died, did you say?

A. I had not seen the key for over two weeks after our father died, then I saw it in his possession.

Q. Now, what was kept in that bureau?

(Testimony of Mrs. Hannah Makainai.)

A. The clothes of our father, his books, his papers and money.

Q. Whose money?

A. I do not know whose money. I think it was his money. He had a right to it.

Q. Your father's money? A. Yes.

Q. Whose papers were there in that bureau?

Attorney SMITH.—We object to that.

Attorney LIGHTFOOT.—I will modify that question: Whose papers were kept in that bureau, if you know?

Attorney SMITH.—We object.

By the COURT.—The objection is overruled.

Attorney SMITH.—We note an exception.

WITNESS.—I believe they were our father's.

Attorney SMITH.—I move the answer be stricken as not responsive to the question.

By the COURT.—The motion to strike is granted. [160]

Attorney LIGHTFOOT.—Did you ever see your father put papers in that bureau?

Attorney SMITH.—We object as the question is leading.

By the COURT.—The objection is overruled. (To Witness.) The Court is desirous of finding out whether or not you know who the papers kept in that bureau belonged to. In your opinion, of your own knowledge? A. Our father's.

Attorney LIGHTFOOT.—Where did Solomon keep his books and papers if you know?

(Testimony of Mrs. Hannah Makainai.)

A. What I know is, he kept them on the table back of the door in the dining-room.

Q. What table was it? The dining-table, or a writing-table, or what kind of a table, was it?

A. It was the writing-table of our father.

Q. And who used to use that writing-table?

A. Our father.

Q. Where did Solomon write?

A. When he came back and our father was very weak, he used that table.

Q. And where did Solomon keep these papers that he wrote on?

A. Sometimes I saw him there with them.

Q. Where did he keep them?

A. On that writing-table.

At this stage the Court adjourned, 5:00 P. M.

Upon resuming at 7:00 P. M. on Thursday, December 18th, Attorney Lightfoot stated that he had a witness, Mrs. Hewahewa, who was feverish and ill and would like to be excused from attendance. He would like to call her at once. The Court granted the request.

Attorney SMITH.—I wish it could be understood that the witnesses for the defense will not be called upon this evening and could be excused for the present.

Attorney LIGHTFOOT.—Yes.

By the COURT.—Certainly. [161]

Testimony of D. K. Hewahewa, for Plaintiff.

D. K. HEWAHEWA was then called and sworn.
(Examined by Attorney LIGHTFOOT.)

Q. Your name is D. K. Hewahewa? A. Yes.

Q. Do you think you can explain enough in English, or would you like to have an interpreter?

A. I think it would be better for me to have an interpreter.

(Charles Swain acted as interpreter.)

Q. You are the husband of Mrs. Hewahewa, daughter of T. K. Lalakea? A. Yes.

Q. You remember the occasion of Mr. Lalakea's death, do you? A. Yes.

Q. I don't ask you for the date, but you remember the occasion? A. Yes.

Q. About what time of the day was that when Mr. Lalakea died?

A. I think I remember Mr. Lalakea dying about noon.

Q. Before or after noon?

A. I think it was after noon.

Q. Where were you living at that time?

A. At Mokuanui.

By the COURT.—At Wainaku? A. Yes.

Attorney LIGHTFOOT.—And where were you staying?

A. I was staying there at the time.

Q. You didn't live then in the Hilo house with your wife? A. Yes.

Q. You said it was in his home? A. Yes.

(Testimony of D. K. Hewahewa.)

Q. When did you first hear that Mr. Lalakea was dead?

A. The same day. The 7th of May I went to the Hilo place and my wife sent my daughter.

Q. And you then learned that Mr. Lalakea was dead? A. Yes.

Q. What did you do when you learned that Mr. Lalakea was dead? A. I went over to the house.

Q. The Lalakea house in Hilo? A. Yes.

Q. When you got to the Lalakea house in Hilo, who was there? [162]

A. Mrs. Hewahewa and Mrs. Makainai.

Q. Was Mr. Solomon Lalakea there?

A. Not at that time I arrived.

Q. Did you do anything with reference to finding Mr. Solomon Lalakea?

A. Mrs. Makainai told me—

Q. You cannot tell us what Mrs. Makainai told you, but in consequence of what she told you what did you do? Anything?

A. I went out to trace Solomon.

Q. What was the object of your tracing Solomon?

A. I got in front of the Hilo Mercantile—

Q. What was the purpose of your going after Solomon?

A. Because the body was lying without outside clothes, just in shirt and drawers, so Hannah told me to chase him, he took the key of the safe.

Attorney SMITH.—That is hearsay and I submit—

(Testimony of D. K. Hewahewa.)

Attorney LIGHTFOOT.—Never mind what Hannah told you. In consequence of what she told you, what did you do?

A. I went to get the key and I got the key.

Q. Where did you find Solomon?

A. In front of the Hilo Mercantile. He was in a hack. He kept on going up to the old fish market and I called him to stop and jumped on the hack and asked him for the key.

Q. The old man was lying without clothes, just in shirt and drawers?

By the COURT.—Is this the idea: That you went and looked up Solomon to procure the key to the bureau so that you might take Mr. Lalakea's, Senior, clothes from the bureau and dress him? Is that the idea?

WITNESS.—Yes.

Attorney LIGHTFOOT.—Where were these clothes of Mr. Lalakea kept?

A. I don't know, but Mrs. Hannah Makainai told me—

Q. Never mind what she told you. All you know is that you went to find Solomon to get the key?

A. Yes. [163]

Q. After you had found Solomon did you have any talk with him?

A. That is all. I asked Solomon for the key.

Q. What did he say to you?

A. He said: "I want to go to Shipman's office," so we went there.

Q. How did you go? With Solomon?

(Testimony of D. K. Hewahewa.)

A. Yes, with him in the carriage.

Q. Where did you go to?

A. To Shipman's office.

Q. What did Solomon do when he got to Shipman's office?

A. He jumped off the car and went into the office and I think he was in two or three minutes and he was out again. He told me Shipman was not in. He went up to W. H. Smith's office on Waianuenue Street and jumped off the car and he handed me the key and I went home.

Q. Back to the house? A. Yes.

Q. Did Solomon have anything with him?

A. I saw a whole lot of papers in a cloth.

Q. I understand you, that when you found Solomon in front of the Hilo Mercantile he then had these papers wrapped in a cloth and he took the papers in a hack with you to Mr. Shipman's office and came out saying he was not in and bringing the papers back? A. Yes.

Q. And told you Mr. Shipman was not in and then you drove to Mr. W. H. Smith's office?

A. Yes.

Q. And from there you went home with the key?

A. Yes.

Attorney LIGHTFOOT.—That is all.

Cross-examined by Attorney SMITH.

About what time of the day do you think that was? About what time in the afternoon?

A. I think somewhere between one and two.

Attorney SMITH.—I think that is all.

Testimony of Mrs. Hannah Makainai, for Plaintiff (Recalled).

Mrs. HANNAH MAKAINAI resumed the witness-stand. [164]

Attorney LIGHTFOOT.—At the time that your father died who was in the house with you?

WITNESS.—Myself and my husband and Solomon.

Q. Was Solomon with you at the time that life left the body of your father? A. No.

Q. Where was Solomon at that time, if you know? A. He went for the doctor.

Q. Was anyone else there that you remember? A. Yes.

Q. Who else was there? A. Mrs. Hewahewa.

Q. Now, did Solomon come back to the house after he had left to go for the doctor? A. Yes.

Q. About what time of the day was it when Solomon returned to the house? A. Two o'clock.

Q. Where were you when he returned?

A. I was in the sitting-room in the house.

Q. Did you hear him come?

A. Yes, I saw him.

Q. What did you do, if anything?

A. I cried before him and told him our father had passed.

Q. And what did he say to you, if anything?

A. His answer to me was, "Shut up."

Q. After answering you in that way, where did Solomon go?

A. He then went into the front bedroom.

(Testimony of Mrs. Hannah Makainai.)

Q. Whose bedroom was that?

A. It was Lalakea's, our father's.

Q. Was the dead body of Mr. Lalakea in the front bedroom at that time? A. No.

Q. What room was the body in?

A. It was in the back room, the back hallway.

Q. When Mr. Solomon Lalakea went into your father's bedroom what did he do?

A. He went direct to that bureau and opened it.

Q. Was it locked when he went to it? A. Yes.

Q. And who had the key to it?

A. He had the key at that time, [165] he was holding it.

Q. Now, after he opened the bureau, what did he do? A. He got some papers.

Q. Do you know what kind of papers?

A. Yes.

Q. What kind of papers were they?

A. Some white and some blue papers.

Q. Were the white a number of these, or just one or two papers?

A. As I recollect, there were quite a few.

Q. He took these papers out of this bureau that you have described and then what did he do with them?

A. He took these papers into the other room adjoining the room in which our father was lying.

Q. What did he do with them there, if anything?

A. He laid them on the bureau and rolled them up in a towel.

(Testimony of Mrs. Hannah Makainai.)

Q. Was it a towel? Where did he get the towel from? A. It was there. From there.

Q. After having rolled up the papers in a towel, what did he do?

A. He turned and looked at our father and left and went.

Q. Went out of the house? A. Yes.

Q. Did you see him again that day?

A. Very late in the evening.

Q. About what time in the evening did he return? A. After three o'clock.

Q. In the afternoon? A. Yes.

Q. And you never saw those papers again, did you? A. No.

Q. He did not have any papers with him when he returned, did he?

A. I did not see him when he returned and came into the house.

Q. During the lifetime of your father, did he ever give you any deed to any land? A. No.

Q. Did you ever get from anyone any deed to any land of your father's? A. Yes. [166]

Q. Who gave you that deed?

A. Solomon Lalakea.

Q. When did he give it to you?

A. Two years after the death of our father. It was two years after his death.

Q. Showing you this paper, I will ask you to tell us if that is the instrument that you received from Solomon Lalakea about two years after your father's death?

(Testimony of Mrs. Hannah Makainai.)

A. I cannot recall exactly the letters of the paper, because I gave it to my attorney.

Q. This is the paper that you gave to your attorney, is it? Just examine it carefully and see.

By the COURT.—Where is the original deed?

Attorney LIGHTFOOT.—Received from the custody of the defendant, I have the deed, which I offer in evidence to be marked Plaintiff's Exhibit "B."

By the COURT.—Let me suggest that you also offer the copy and I will have that marked Exhibit "B-1."

Attorney LIGHTFOOT.—Very well. (To Witness.) Can you tell if that is the paper you gave to the lawyer, after examining it?

Attorney SMITH.—I admit it.

Attorney LIGHTFOOT.—I offer in evidence certified copy of the deed of land from T. K. Lala-kea to Hannah Makainai and there is a date of March 6th, 1915, recorded in the Registrar's Office in Oahu on liber 428, pages 131 to 132, showing the signature of C. F. Parsons, Judge of the Circuit Court of the Fourth Judicial Circuit.

By the COURT.—Let the document be received. and marked Plaintiff's Exhibit "B-1."

Attorney LIGHTFOOT.—Showing you Plaintiff's Exhibit "B," being the deed or purported deed of your father to you, I would ask you if your father ever gave you that deed?

Attorney SMITH.—We admit he did not give it to her. That is not in person. [167]

(Testimony of Mrs. Hannah Makainai.)

Attorney LIGHTFOOT.—Did your father ever say anything to you about giving you, or having given you any land, before his death?

(Attorney Smith objected.)

Attorney LIGHTFOOT.—I will withdraw the question. You may cross-examine.

Attorney SMITH.—You are staying now at the home of your brother here, Solomon?

WITNESS.—To-day.

Q. Whenever you come to town you stay there, don't you? A. At Lalakea's place, I stay.

Q. At the place where Solomon Lalakea makes his home? A. No.

Q. Solomon Lalakea makes his home here on Bridge Street, doesn't he?

A. I don't know anything about Solomon; that place belongs to our father.

By the COURT.—You are living in the home formerly occupied by your father?

WITNESS.—Yes.

Attorney SMITH.—And the house is supplied so far as food is concerned by Solomon, is it?

A. No.

Q. Do you say that Solomon came to live here in Hilo at the request of your husband, a short time before your father died? A. Yes.

By the COURT.—Let me ask right here: Do I understand your evidence to be that your father was taken ill in August of 1914 and continued ill, that is, never recovered until he died in May, 1915?

WITNESS.—Yes.

(Testimony of Mrs. Hannah Makainai.)

Attorney SMITH.—And Solomon came from Honolulu to live in Hilo in February, 1915, did he?

A. I cannot remember when he came back.

Q. But you say that whenever he did come back it was at the request of your husband? A. Yes.

Q. You mean your husband wrote to him to come, is that it? A. Yes. [168]

Q. And that was at the request of your father, was it not? A. No.

Q. Is it not a fact that your father sent through Mr. Makainai or otherwise, to Solomon to come up and assist him in the handling of his work and business, because he was so sick? A. No.

Q. Why did Mr. Makainai want him to come?

A. Because he knew father was failing.

Q. Do you mean to say that it was not at the request of your father that Solomon was sent for?

A. Yes.

Q. That is, she means "No." Is that the idea? Would that way be the Hawaiian way of answering in the negative? You have spoken of Solomon writing at his desk in the dining-room: that was the room that your father used for his office for transacting business, wasn't it?

A. Yes, that was the table he used.

Q. And this writing that you talk about Solomon doing and these papers he was working on was work he was doing for your father, wasn't it, in handling his business? A. I don't know.

Q. You have spoken of the place where Solomon kept his papers: What papers do you mean Solo-

(Testimony of Mrs. Hannah Makainai.)

mon kept on this table in his office? What papers are you talking about? A. On what table?

Q. What papers? A. I don't know what papers.

Q. You say they were Solomon's papers: What papers were they? What were they about?

A. I don't know. I know they were his because he did the writing on them.

Q. And that is the only reason for thinking they were his papers, isn't it. A. Yes.

Q. Didn't your father keep papers there also?

A. There were [169] a lot of papers there. I couldn't tell whether they were my father's.

Q. And there were a lot of papers in the bureau that were kept under lock and key?

A. I don't know because I have never seen inside that bureau.

Q. You don't know what was kept there?

A. I would know that my father would go there and bring out some clothes.

By the COURT.—Let me ask you: How ill or how feeble was your father on the 6th day of March, 1915, the day before he died?

Attorney LIGHTFOOT.—If the Court would pardon me. Mr. Lalakea died on the 7th day of May and these instruments are dated the 6th day of March, but the evidence is that Lalakea died on the 6th of May, 7th, I mean.

By the COURT.—I withdraw the question.

Attorney SMITH.—You have stated at one time on your direct examination that it was two weeks

(Testimony of Mrs. Hannah Makainai.)

after your father died that you first saw Solomon have the key, is that true?

WITNESS.—Yes.

Q. Then how is it that you have also stated on your direct examination that “Solomon went to the bureau and opened it. It was locked and he had the key?” A. Yes.

By the COURT.—Mr. Smith wants to know what do you mean by the two statements. The statement that you did not see Solomon with the key until two weeks after the death of your father and the other statement that you saw Solomon with the key shortly after life had left the body of your father?

(No answer.)

Attorney SMITH.—Have you any explanation to make?

WITNESS.—Yes.

Q. What is it?

A. A week prior to the death of our father I saw him with that key. It was a week prior to his death I saw him have the key. I may have made a mistake. I saw it again in his possession a week after he died. It was a week prior to his death I saw him with the key.

By the COURT.—And you say you saw him with the key shortly [170] after life had left the body? A. No.

Attorney SMITH.—Then how did he get into the bureau or the place where you say he got the papers from?

(Testimony of Mrs. Hannah Makainai.)

A. Well, that is, a week prior to Papa's death I did not see the key until he died.

Q. Well, did or didn't he have the key at that time, just after your father's death?

A. Solomon had it at that time.

Q. You swear positively that he took a lot of papers out of that chest or bureau, or whatever it was, and took them away? A. Yes.

Q. Is it not a fact that he took the papers from a shelf in the room that your father used as an office, where the desk was? A. No.

Q. Do you know William Keolanui? A. Yes.

Q. Do you remember making any statement in his presence at any time in regard to this particular matter, the matter of Solomon getting the papers?

A. From Keolanui?

Q. Do you remember making any statement in the presence of Keolanui in regard to the matter of taking these papers by Solomon? A. No.

Q. Did you never say anything about this matter in the presence of William Keolanui? A. No.

Q. I will ask you whether you didn't make a statement in the presence of William Keolanui at the late residence of your father on Bridge Street, in regard to the matter of the taking of these papers? A. No.

Q. I have to leave that particular matter at this point with the request that I be allowed to continue later on as I wish to fix the date, as well as the place, and Keolanui is not here just now. He was called by us as a witness and has gone away.

(Testimony of Mrs. Hannah Makainai.)

Attorney WISE.—He is outside. [171]

By the COURT.—Who was your father's physician during this illness?

A. An okinau doctor, then Dr. Kuramoto.

Attorney SMITH.—Do you remember having a conversation with Mr. Lightfoot and in the presence of William Keolanui at your late father's residence, in which you made a statement with reference to the matter of the taking of these papers by Solomon Lalakea?

Attorney LIGHTFOOT.—I submit the question should be made more definite as to time as well as place.

By the COURT.—I think the objection comes within that rule.

Attorney SMITH.—I will add: on the occasion of your first interview with Mr. Lightfoot in Hilo, with regard to this case. I do not know the date.

Attorney LIGHTFOOT.—I object on the grounds it is too indefinite.

By the COURT.—I still think the objection comes within the rule.

Attorney SMITH.—I will withdraw it and try to get at it in another way. (To Witness.) I will ask you whether Mr. Keolanui acted as interpreter for you in any interview you had with Mr. Lightfoot?

Attorney LIGHTFOOT.—I object.

By the COURT.—The objection is overruled.

Attorney LIGHTFOOT.—I note an exception.

WITNESS.—No.

(Testimony of Mrs. Hannah Makainai.)

Attorney SMITH.—Was he present? A. No.

Q. He was not present at the first interview that you had with Mr. Lightfoot in regard to this case?

A. No.

Q. How many interviews subsequent to that first one did you have with Mr. Lightfoot?

Attorney LIGHTFOOT.—I object on the ground of privilege. It is none of the business of the other side how many interviews we had. [172]

By the COURT.—The objection is sustained.

Attorney SMITH.—You say that Mr. Keolanui was not present at any of the interviews?

Attorney LIGHTFOOT.—I object on the ground that the question has been asked and answered several times.

By the COURT.—I don't think it would be of any harm to answer the question.

WITNESS.—No.

Attorney SMITH.—That is all.

Attorney LIGHTFOOT.—After Solomon took the papers out of the bureau and went to look at his father's body, where were the papers?

Attorney SMITH.—I object, as this does not arise out of the cross-examination.

By the COURT.—I will sustain the objection and permit you to ask the question as part of your direct examination.

Attorney LIGHTFOOT.—After Solomon took these papers out of the bureau and while he was looking at his father's dead body, where were the papers? A. He was holding them in his hand.

Attorney LIGHTFOOT.—That is all.

Testimony of David Makainai, for Plaintiff.

DAVID MAKAINAI was called and sworn as witness.

(Examined by Attorney LIGHTFOOT.)

Q. What is your name? A. David Makainai.

Q. And you are the husband of Hannah Makainai? A. Yes.

Q. From August, 1914, to May 7th, 1915, where were you residing? A. In Hilo here.

Q. In the house of Lalakea? A. Yes.

Q. Do you know the room in that house that is next to the bedroom of Mr. T. K. Lalakea? A. Yes.

Q. Do you know the bureau, the dresser, in that room? A. Yes.

Q. From the time that Mr. Lalakea went to reside in that house in August, 1914, up to the time of his death, state whether or not [173] that bureau was kept locked?

Attorney SMITH.—I object on the grounds that the witness does not know anything about it.

By the COURT.—Answer the question.

Attorney SMITH.—I note an exception.

WITNESS.—Yes, I know.

Attorney LIGHTFOOT.—Was it kept locked or not?

A. I don't know. It may have been locked. I don't know.

Q. Don't you know whether it was usually locked or not?

(Testimony of David Makainai.)

Attorney SMITH.—I object on the grounds that the question is leading and suggesting.

By the COURT.—Answer the question.

Attorney SMITH.—I note an exception.

WITNESS.—Yes, it was usually locked.

Attorney LIGHTFOOT.—Up to within two weeks of the death of Thomas K. Lalakea, who kept the key of that bureau, if anyone?

A. I think his son, Solomon.

Attorney SMITH.—I move the answer be stricken.

Attorney LIGHTFOOT.—No objection.

By the COURT.—The motion is granted.

Attorney LIGHTFOOT.—Did you understand the question?

WITNESS.—Not thoroughly.

Q. I am not speaking of the two weeks immediately prior to Lalakea's death. I am speaking of the time prior to that, from August, 1914, up to about two weeks before Mr. Lalakea's death, who kept the key of that bureau, if anyone?

A. I don't know. By himself.

Q. Now, for the two weeks prior to Mr. Lalakea's death, was Mr. Lalakea able to move around, walk about? A. No.

Q. And during that time, do you know who had the key of this bureau?

A. Probably his son, Solomon. [174]

Attorney SMITH.—I move the answer be stricken.

Attorney LIGHTFOOT.—No objection.

(Testimony of David Makainai.)

Attorney LIGHTFOOT.—Do you know what there was in that bureau? A. Yes.

Q. What?

A. Papers, money, notes and some of his clothes.

Q. Whose clothes? A. The elder Lalakea.

Q. And to whom did the notes and papers and books belong, if you know?

Attorney SMITH.—I object to this form of question again. I insist that the witness be asked if he knows to whom they belong.

By the COURT.—The objection is overruled. Answer the question.

Attorney SMITH.—I note an exception.

WITNESS.—To Lalakea, the old man.

Attorney LIGHTFOOT.—Did anyone else keep books and papers and money and clothes in that bureau, other than the old man, Mr. T. K. Lalakea?

Attorney SMITH.—If you know?

Attorney LIGHTFOOT.—If you know?

WITNESS.—I do not know.

Q. Then you don't know whether anybody else put anything in that bureau or not? Is that right?

A. Yes.

Attorney LIGHTFOOT.—That is all.

Attorney SMITH.—You did not contribute anything to the store of merchandise and valuables in the bureau, did you? A. No.

Q. How do you happen to know about the notes and the money and so forth, being there?

A. Sometimes the old man would get me to go

(Testimony of David Makainai.)

and send me to the bureau to get money and things before Solomon returned.

Q. When did Solomon return?

A. I recall distinctly, it was during the first months of the year 1915, I think it was February.
[175]

Q. After Solomon returned you were not entrusted with the duty of caretaker of the bureau, is that it? A. Yes.

Q. And from that time on when it became necessary for Mr. Lalakea, Senior, to send some one to the bureau to get papers and money, or deposit the, Solomon was the one who was sent, wasn't he?

A. That is what I think.

Q. And sometimes he had the key and sometimes his father had the key? A. Yes.

Q. As a matter of fact, from the time of Solomon Lalakea's return from Honolulu, until the death of his father, he was assisting him practically all the time in the handling of his business, wasn't he? A. That is right.

Q. You are a painter by occupation? A. Yes.

Q. And during the period I speak of you were away from home for long periods at a time doing work in the country?

A. Not far away; around town here.

Q. Well you would be away for periods for a number of days, would not you? A. No.

Q. You were home every night? A. Yes.

Q. Did you send for Solomon Lalakea to come to 'Hilo? A. Yes.

(Testimony of David Makainai.)

Q. That was at the request of his father, was it not? A. No.

Q. All on your own initiative?

A. Myself and my wife.

Q. His father never intimated that he wanted him to come?

Attorney LIGHTFOOT.—We object to that question.

By the COURT.—The objection is overruled. Answer the question.

Attorney LIGHTFOOT.—We note an exception.

WITNESS.—He didn't want Solomon to come home, because Solomon was working in Honolulu at the time.

Attorney SMITH.—He did not want him to give up his job there, is that what you mean?

A. Yes, that is what I mean.

Q. Then why did you send for him?

A. Because I could find that Solomon was the proper person to attend to the business in the [176] place of the old man.

Attorney LIGHTFOOT.—That concludes the evidence on this feature of the case. There is another matter that will be presented referring to the genuineness, or otherwise, of the signature which will take some time in preparation and I should wish to return to Honolulu to-morrow and my learned friend will have to continue the case for me. *I would therefore* for a reasonable time to be allowed to Senator Russell for preparation to continue this hearing.

By the COURT.—What do you consider a reasonable time?

Attorney LIGHTFOOT.—The Senator has suggested until Monday. To secure the services of experts or nonexperts on handwriting, I believe that the Senator has it in mind to get examples of admitted signatures of Mr. Lalakea for the purpose of comparison by the Court and possibly he will be able to call such experts as are available.

Attorney SMITH.—We want the other half.

Attorney LIGHTFOOT.—I will allow my learned friend to have the other half, because we shall get the best half.

Attorney RUSSELL.—This is not a matter in which we could prepare a case quickly. We have not seen the original deed until to-day.

By the COURT.—Is there any objection to a continuance until Monday?

Attorney SMITH.—If your Honor pleases, I would suggest that it be continued until such date as it can be completed as a whole.

Attorney RUSSELL.—I would prefer some day subsequent to Monday.

By the COURT.—The further hearing is adjourned until Monday, December 29th, being satisfactory to both sides, and it is so ordered. [177]

I hereby certify that the foregoing (pages Nos. 1 to 52, inclusive) is a true, full and faithful transcript of my notes in the above-entitled cause.

J. M. BAINS,

Acting Stenographer, Fourth Circuit Court.
Hilo, January 31st, 1920.

(Testimony of H. V. Patten.)

[Endorsed]: L. No. 671. Doc. 3, pg. 92. Transcript of Evidence. Filed at 10:05 o'clock A. M. January 31, 1920. Thomas Pedro, Jr., Clerk.

No. 1257. Rec'd and Filed in the Supreme Court, February 2, 1920, at 9:45 A. M. J. A. Thompson, Clerk.

No. 1345. Rec'd and Filed in the Supreme Court, Aug. 16/21, at 10:20 A. M. J. A. Thompson, Clerk. [178]

Monday, January 26th, 1920.

Testimony of H. V. Patten, for Plaintiff.

Mr. H. V. PATTEN, called, sworn and examined on behalf of the plaintiff.

Direct Examination by J. W. RUSSELL, Esq.

Mr. Patten, you are the cashier and manager of the First Bank of Hilo, Ltd.? A. Yes.

Q. And that is a bank that is doing business in Hilo? A. Yes.

Q. And you have been cashier and manager for how long? A. Thirteen years.

Q. And during that time did you know T. K. Lalakea up until the time that he died? A. Yes.

Q. Did you have occasion to do business with him? A. Yes.

Q. Did he do his banking with the First Bank of Hilo, Ltd.? A. Personally?

Q. Do you recall whether or not he did?

A. He has had business transactions with us.

(Testimony of H. V. Patten.)

Q. Did he bank with you?

A. I could not say, personally or not.

Q. He was treasurer of the county of Hawaii, was he not? A. Yes.

Q. And as such he did have an account with the First Bank of Hilo, Ltd.? A. Yes.

Q. And did you have occasion to see his signature? A. Yes.

Q. Did you ever see him write his signature?

A. Yes.

Q. Are you familiar with his signature? [179]

Q. That is you have a mental picture in your mind of his signature. A. Yes.

Q. Do you believe that you would be able to recognize his signature if you saw it at this time?

A. Yes.

Q. I show you, Mr. Patten, Defendant's Exhibit 1 purporting to be the signature of T. K. Lalakea, will ask you if in your opinion that is his signature?

A. It does not look to me like his signature.

Q. As cashier of the bank did you have occasion frequently to compare signatures? A. Yes.

Q. And occasion arises incidental to the business of the bank is it not? A. Yes.

Q. How long a period of time did Mr. Lalakea bank with the First Bank of Hilo, Ltd., as treasurer of the county?

A. I think all the time he was treasurer of the county.

(Testimony of H. V. Patten.)

The COURT.—When the Government went into effect?

A. I believe he was the first treasurer.

Mr. RUSSELL.—Q. Basing upon your recollection Mr. Patten how frequently would you have occasion to see his signature?

A. Well I saw his signature every time he cashed a check, and especially when he made notes.

Q. And did you have any transactions with him other than as treasurer of the Territory of Hawaii?

A. Yes.

The COURT.—Let me ask you Mr. Patten is it not a fact that all of the warrants that were issued on the county of Hawaii from the time that you became cashier and for several years thereafter they were cashed by the First Bank of Hilo, Ltd.?

A. Yes. [180]

Q. In fact all of them? A. Yes.

Mr. RUSSELL.—And you had occasion to see these warrants? A. Yes.

That is all.

Cross-examination by Mr. W. H. SMITH.

Q. The period during which you were familiar with the signature of Mr. Lalakea as treasurer of the county of Hawaii extended from the time that you were in the bank say 1906 until Mr. Lalakea ceased to be treasurer which was in 1910?

A. Yes.

Q. Mr. Patten the signature observed on these warrants in connection with the stamp which bears

(Testimony of H. V. Patten.)

the mark "paid," that is the signatures which you have reference to, is it not?

A. I did not signify Lalakea's signature on the warrants but on the checks.

Q. These checks, as a matter of fact, pass through the hands of the assistant cashier, etc., do they not?

A. They pass through the hands of the tellers.

Q. Did you have occasion to observe any transaction or to pay yourself individually any particular attention to the signature of Mr. Lalakea?

A. Mostly pertaining to notes.

Q. Individual notes? A. Yes.

Q. So then Mr. Lalakea did have individual transactions with the bank all during the time that he was treasurer? A. Yes.

Q. Now what have you to say with a check that had this signature of "T. K. Lalakea" what is there about it that [181] caused you to doubt its authenticity?

A. The general appearance of the signature. You understand I am not an expert on signatures, but that check would have to be confirmed before it could be cashed.

Q. You do not as a matter of fact find that Mr. Lalakea's signature in certain respects differs slightly from one signature to the other, on account of the condition he was in, the press of business or apparently due to excitement? A. No.

The COURT.—Let me ask you right there, if the general appearance of his health, if that would

(Testimony of H. V. Patten.)

not indicate some slight variations in his signature, that is, indicate that he was not very well?

A. No, I do not mean that, I mean the difference in the making of the letters.

Mr. SMITH.—Q. As a matter of fact, the period that Mr. Lalakea was doing business with the bank as officer of the territory, that is treasurer of the county was during a period when he apparently was in good health? A. Yes.

Q. From the time that he was confined to the house have you had any transactions with him, that required his signature, or that you had particularly observed his signature? A. No.

Q. Now, with reference to this Defendant's Exhibit 1, will you as near as you can state if this is authentic, or what lead you to doubt its authenticity?

A. To my mind the appearance of the signature and which suggests to myself whether or not the authenticity of the signature, you see I am not an expert on signatures. [182]

Q. I understand, Mr. Patten, but just basing your opinion upon your acquaintance with Mr. Lalakea?

A. The "T" to my mind does not look like his "T" neither does the "K." Now, if I could have a signature of his to show you I could compare it.

I will show you this document, which was introduced for the purpose of cross-examining Mr. Shipman.

(Testimony of H. V. Patten.)

Mr. RUSSELL.—Will you admit, Mr. Smith, that this is the genuine signature of T. K. Lalakea in Defendant's Exhibit "L"?

Mr. SMITH.—Well, I don't know.

The COURT.—Are you willing to admit that the signature in exhibit "I" is the signature of T. K. Lalakea?

Mr. SMITH.—I suppose it is.

Q. Show you these notes, Mr. Patten, 1906 to 1909, will you?

The COURT.—Let me suggest that you designate the date?

Q. Will you take this note dated November 7th, 1906, which appears the signature of T. K. Lalakea and tell us what differs?

A. Well, first, the "T" does not resemble the "T" in the note and the "K" does not look like it to me.

Q. Will you say, that they are so different that they would not lead you to suggest that the condition of T. K. Lalakea, that T. K. Lalakea's condition being so that the characters were a little different, or that they were not made by the same individual?

A. No, I would not say.

Q. Now, the "T," if we eliminated this mark or letter to the right in "Exhibit 1," but take the rest of the letter which forms the "T," isn't it in a general way made in the same manner as the "T" in this here note?

A. I do not see much resemblance.

(Testimony of H. V. Patten.)

Q. How about the "K," he signed the "K" in the same general way, the same type of a "K." [183]

A. It seems to me that the question you are asking me is one that you would put to an expert and I must say that I am not an expert, I would say that just merely glancing at it I could say whether or not it was his signature or not.

The COURT.—This signature on Exhibit "I" would this be held up before you would cash this document in the bank?

A. I would want it confirmed first before I would cash it.

Q. While the instrument dated November 7, 1906, do you want your testimony to be that you would unhesitatingly cash that as that being the signature of Lalakea? A. That is his signature.

Mr. SMITH.—Q. Now, with regard to the "K" this apparently is made the same way, is it not, in your opinion formed in the same general style, the same fluctuations of the pen that appear on one and not on the other.

A. I would say the "A" and "K"—well, I don't know how to express myself. I would say that the "K" does not resemble each other.

Q. Now, let me ask you this question, Mr. Patten, as being at least somewhat an expert on signatures, isn't it likely that a man in committing forgery most likely to closely resemble the genuine signature?

(Testimony of H. V. Patten.)

A. I have seen forgeries that I could not detect from the original.

Q. A good imitation?

A. A good imitation.

Q. Don't they show that attempt in a close conformity to the genuine signature rather than any great variance from it. A. Yes. Why, yes. [184]

Q. Would you say, Mr. Patten, that but for a reasonable amount of shakiness in exhibit one apparently differs in the name of Lalakea in the second, but that they are the same characters?

A. I cannot see any resemblance.

The COURT.—Mr. Patten, do you picture in your mind the signature of a person?

A. Yes, in my business of the bank, I picture in my mind the signature of a person and can tell whether it is or not.

Q. You have a mental picture in your mind now of the signature of Lalakea? A. Yes.

Q. And this so refreshens your recollection?

A. Yes.

Q. Now, having a mental picture of Thomas K. Lalakea signature in your mind which you have definitely fixed, would you say that the signature in this exhibit is the signature of T. K. Lalakea?

A. Well, in my opinion the same person did not write that.

Mr. SMITH.—Do you base your opinion on the capital "L" in Exhibit "I" and the capital "L" in the note which I show you?

A. A. Yes.

(Testimony of H. V. Patten.)

Q. The "L" is made in a somewhat different way? A. Yes.

Q. The starting point is from the other direction? A. Yes.

Q. And the "K" is made differently?

A. Yes.

Q. So far as the others are concerned the formations are about the same?

A. The "L" is entirely different.

Q. Which "L"? [185]

A. That is the third. The "K" is also made differently.

Q. That is made apparently different also?

A. Yes. But I realize that on some of the notes the signature of Lalakea varies, and they show in these notes.

Mr. SMITH.—At this time I desire to have marked for identification note of November 7th, 1906, that is just the one referred to.

The COURT.—The note may be received for the purpose of identification and marked Defendant's Exhibit "A."

Q. Calling your attention, Mr. Patten, to a note dated June 4th, 1909, which I ask at this time that it be marked for identification as Defendant's Exhibit "B" for identification?

The COURT.—The note may be received in evidence and marked Defendant's Exhibit "B" for the purpose of identification.

Q. I ask you if the "T" in this document just referred to is that the same,—is that character the

(Testimony of H. V. Patten.)

same and similar in your opinion to the "T" in Exhibit 1.

A. Is it different from the genuine one it does not resemble the "T."

Q. If you eliminate the mark to the right of the top wouldn't it be the same?

A. Seems to be the same shakiness.

The COURT.—You said shakiness, Mr. Patten, just at that point; is that indication of much shakiness, the "T" A. "L" as given in Defendant's Exhibit 1; what have you to say?

A. More or less.

Q. Then in writing doesn't the shaky hand indicate the shakiness of the hand nearing the end of a letter.

A. No, shakiness in "L" come to the last part of "K" "E" "A" and that you can see.

Q. Then the "L" indicate to your mind, referring to Exhibit "B," a shaky hand? [186]

A. You refer to —?

Q. Lalakea—doesn't the signature T. K. Lalakea in Exhibit "B" indicate to your mind a shaky hand? A. No, not particularly in that one.

Q. Well, look at the "K" "L" and "A," the second "A" the "Kea"?

A. And also of all the others; unfortunately I have not my reading glasses with me, so I can't see very well.

Q. A decided shakiness?

A. Yes, particularly in the "T" and to my mind right thru.

(Testimony of H. V. Patten.)

The COURT.—Mr. Smith, I think that the name McGuire might have had some effect on that one way or the other. A. Might be.

Mr. SMITH.—I have here a document which I will ask to be numbered Defendant's Exhibit "C" for identification.

The COURT.—The document may be received and marked Defendant's Exhibit "C" for identification.

Q. I show you this purported signature of "T. K. Lalakea" made in 1915 and ask you what you would say in regard to that as compared with Exhibit "L" whether or not most specifically it does show a variation from our Exhibit "A" for identification as Exhibit "L."

A. That shows variations all through.

The COURT.—What is the date of that?

A. 15th day of January, 1915.

Q. Is that the signature of Thomas Lalakea (referring to the note of Jan. 15th, 1915)?

A. I should say that it was.

Q. You haven't any doubt in your mind about it?

A. My opinion it is his signature.

Mr. SMITH.—Q. Now, the letters in that signature are, especially the capital are different from this in the note? [187]

Q. They more nearly resemble the formation of the letters in Exhibit "I," which appears that this note was made three months later than the one just referred to; is that not so?

The COURT.—What is the date of that?

(Testimony of H. V. Patten.)

Mr. SMITH.—March 6th, 1916.

Q. The general swing, in a general way the capital letters in the document shown you does somewhat resemble each other?

A. I can't see much resemblance.

Q. Well, for what reason in what respect?

A. The general swing, the general appearance in the signature throughout.

Q. The "L" in Exhibit "I" more closely resembles the "L" in the T. K. Lalakea on Exhibit "C" than it does in Exhibit "A," doesn't it?

A. I see no resemblance whatever to the "L" in Exhibit "I" and Exhibit "A."

Q. But there is some resemblance between the "L" upon Exhibit "A" and the "L" in Exhibit "C"?

A. In both Exhibit "C" and Exhibit "I" I do not see any resemblance to the "L" whatever.

Q. As to whether or not they started at the same point? A. No.

Q. Does that not so indicate in the note of Exhibit "A"?

A. Well, one starts one way and the other, the other way.

Q. Matter of fact, Mr. Lalakea had two ways at various times which he used in making the "L," one as shown in Exhibit "A" marked for identification and one as shown in Exhibit "C" for identification?

A. He evidently had a different way in signing his "L," but that is his signature.

Recess 11:05 A. M. [188]

(Testimony of H. V. Patten.)

Q. When you spoke, Mr. Patten, of having a mental picture of an official signature it would not be any fixed picture would it, however, of the formation of the letters as shown you in this exhibit?

A. Yes, I have a mental picture of that signature, and if there is any peculiar formation in it I would note it, but I generally know a man's signature that I do business with.

Mr. SMITH.—I desire to have this document marked Defendant's Exhibit "D" for identification?

The COURT.—The document may be received in evidence and marked Defendant's Exhibit "D" for identification.

Q. I ask you whether or not that does not differ more from "B" from "A" and "B" than it does from Exhibit "I"?

A. That differs from any signature that I ever saw of his.

Q. If a note was presented to you to be cashed with that signature you would ask for further confirmation of that signature, would you?

A. If that signature had been presented at the bank as the signature of Lalakea I would most certainly ask for a confirmation of the same.

Q. There would be a doubt in your mind?

A. I never saw him sign his name "Thomas Lalakea," before.

The COURT.—What is the date of the note?

A. Note made January, 1915.

(Testimony of H. V. Patten.)

Q. Mr. Patten, referring to the document marked Defendant's Exhibit "D" for identification, there is more or less a familiarity in the manner of the writing "Lalakea" all throughout Exhibit "D," there seems to be in a shaky hand than does the signature in the document, bearing the name of "T. K. Lalakea" under date of March 4th, 1909? [189]

A. There is a resemblance in the signature "L," in my opinion.

Mr. SMITH.—You would not say, Mr. Patten, that there is no resemblance to Exhibit "I," the note referred to and just shown you?

A. You want me to answer the question?

Q. Yes.

A. In my opinion, there is little resemblance in his signature in Exhibit "I" as I know it.

Q. Up to what? A. 1910.

Q. As I understand it, Mr. Patten, you do not recall whether Mr. Lalakea carried a personal account with the First Bank of Hilo?

A. No, I do not recall.

Q. In regard to the checks signed by him for the payment of county warrants those passed through the hands of your assistants, did they not, because of the fact that as general manager of the bank you were busy engaged with something else, some other affairs? A. Yes.

Q. Now, from 1906 until 1910 or 1911 what was the extent of the business transacted by Mr. La-

(Testimony of H. V. Patten.)

lakea with the bank on his personal account which required him to execute his signature?

A. That required the personal execution of his signature?

Q. Yes.

A. I could tell you about many thousand of dollars.

Q. Many separate transactions, which were his personal affairs. A. Yes.

Q. Well, I ask you whether or not you had occasion yourself [190] to pass upon these notes at the time when they were executed, or were they handled in the regular course of business by your assistants. I want as clear a statement from you as possible as to how much it was necessary for you to pass upon the signature of T. K. Lalakea.

A. Lalakea borrowed great sums of money from us on notes, and more particularly when he was employed by the county and these notes were also signed by McGuire, and you know that.

Mr. SMITH.—The Judge has judicial knowledge of that I think.

A. I could not say how many notes he had signed but a large number of them for large sums of money.

Q. Did you particularly examine these notes?

A. He came to me for the loans, then he was sent to the teller and there made the notes out.

The COURT.—Mr. Patten, taking the total sum borrowed by T. K. Lalakea of \$56,722.20 and the average loan to be approximately of \$300, he would

(Testimony of H. V. Patten.)

have his signature appear about 1800 times, would you say?

A. I could not say as to that, Judge.

Q. Well, some of the sums were large sums?

A. Some were as high as \$1,000.

Q. What would you say, what is your best judgment,—would you say that his signature appeared during the four years that is between 1906 and 1910 about 1000 times?

A. No, I would not say a thousand times.

Q. How much less than a thousand times would you say?

A. Merely guesswork, I would say between 250 and 500 times.

Mr. RUSSELL.—On notes?

A. That is merely guesswork. Yes. [191]

Mr. SMITH.—From the time that Lalakea ceased to be treasurer of the county of Hawaii up to March, 1915, what is your opinion, that is, based upon actual matters, as to the number of times you had occasion to pass upon his signature?

A. After?

Q. After he ceased to be treasurer of the county of Hawaii up until March 1915.

A. Very few times, very few occasions. I believe after that he signed a note, I am not quite clear upon that, but business transactions were very few after he ceased to be treasurer of the county.

That is all.

Redirect Examination by Mr. RUSSELL.

Q. Mr. Patten with reference to the signature of

(Testimony of H. V. Patten.)

“Thomas K. Lalakea” as same appears in Defendant’s Exhibit “D” which is marked for identification, you say that you would not honor any check, that appeared with that signature, I will ask you if you can give any reason why that signature would excite any inquiry?

A. Well, as I stated, I had never seen “Lalakea” sign his name “Thomas Lalakea” before.

Q. Is that the only reason you would question this, and want a confirmation?

A. If a check had been written in that manner I certainly would want it confirmed before cashing it, I had seen him sign his name many times but never before in this manner.

Q. Then the word “Thomas” would excite your inquiry?

A. It certainly would, as that is not his official signature that we have at the bank.

That is all. [192]

Testimony of Kumijiro Hamada, for Plaintiff.

K. KAWSAKI, Japanese Interpreter.

KUMIJIRO HAMADA, called, sworn and examined on behalf of the plaintiff.

Direct Examination by Mr. RUSSELL.

Q. You live at Kaiwiki, Hilo, Hawaii? A. Yes.

Q. I show you an instrument, and ask you if you ever received this instrument from Thomas K. Lalakea? A. Yes.

Q. And did you see Mr. Lalakea sign this instrument? A. I did.

(Testimony of Kumijiro Hamada.)

Q. Who was present at the time?

A. Mr. Lalakea and myself.

Q. Do you know Solomon Lalakea?

A. Yes, I know him.

Q. Was he present at the time?

A. He was there too.

Q. Well, did Mr. Solomon K. Lalakea during the execution of this deed, this lease, did he take part in the matter? A. No.

Q. Well, did—I will ask you if Solomon Lalakea sent for you to come down to see him at the time you executed this lease?

Mr. SMITH.—That is objected to, if the Court please, upon the ground that it is incompetent, irrelevant and immaterial.

Q. I will ask you if at the time that this lease was executed Solomon Lalakea sent for you to have it executed?

Mr. SMITH.—Same objection, if the Court please, upon the ground that it is incompetent, irrelevant and immaterial at the present time.

Mr. RUSSELL.—The purpose of this, if the Court please, is that I want to show that the property described in this lease [193] is part of the property that is described by Defendant's Exhibit "I" and that this is a lease from "T. K. Lalakea" to this witness, and the question at this time, is to show that this lease was executed upon the date named in the lease of this property, to this witness.

(Testimony of H. B. Mariner.)

The COURT.—The Court will sustain the objection at this time, Mr. Russell, upon the ground that at some time during the case Mr. Solomon Lalakea is called; it seems to me that this evidence might be proper in rebuttal.

The COURT.—The objection is sustained.

Mr. RUSSELL.—I desire to offer this lease in evidence.

Mr. SMITH.—No objection.

The COURT.—The lease may be received in evidence and marked Plaintiff's Exhibit "C."

Mr. SMITH.—No cross-examination.

The Court at this time takes a recess until 2 P. M.

Testimony of H. B. Mariner, for Plaintiff.

Mr. H. B. MARINER, called, sworn and examined on behalf of plaintiff.

Direct Examination by Mr. RUSSELL.

Q. Mr. Mariner, you are the treasurer and manager of the First Trust Co. of Hilo Ltd.? A. I am.

Q. And have been for how long? A. Eight years.

Q. Did you know T. K. Lalakea during his lifetime? A. Yes.

Q. Had you known him during that time in a business way? A. I did.

Q. And have you had occasion to see him write his name?

A. I don't recall that I ever saw him write his name.

Q. Do you recall ever having received any letter from him? [194]

(Testimony of H. B. Mariner.)

A. Letters and other documents I have received from him.

Q. And are you familiar with his signature?

A. Yes.

Q. Have you a pronounced mental impression of his signature? A. Yes.

Q. Would you recognize his signature if you were to see it? A. I believe so, yes.

Q. I show you an instrument that is marked Defendant's Exhibit "I" and will ask you if you recognize Lalakea's signature appearing there of "T. K. Lalakea," is that the signature of T. K. Lalakea? A. I should say not.

Q. In your opinion, is it the signature of T. K. Lalakea? A. In my opinion it is not.

Q. Will you give your best recollection as to how frequently you had occasion to see his signature?

A. Well, doing business with the Trust Company I would say two or three times a year.

Q. And had you before that seen it?

A. Yes, I had occasion to see quite a bit of it.

Q. And did you have occasion to see his signature, that is, in connection with his office as County Treasurer? A. Yes.

Q. I will show you Defendant's Exhibit 2 and ask you if you recognize that as T. K. Lalakea's signature.

A. I should say that is the signature of Mr. Lalakea.

Q. I will show Defendant's Exhibit "C" marked

(Testimony of H. B. Mariner.)

for identification and ask you if you recognize that as the signature of T. K. Lalakea.

A. Apparently that is his signature. [195]

Cross-examination by Mr. SMITH.

Q. What period of time, Mr. Mariner, did your acquaintance with the signature of Mr. T. K. Lalakea extend as near as you can recall?

A. From April or May, 1911, until up to the time of his death. I was in Honolulu working for the Trust Company and I had occasion to come to Hilo, and my acquaintance extended from that time, that is, 1903 until 1911. You see, I was connected with the Hawaiian Trust Company in Honolulu, and before that, that is before I saw him, I had seen his signature, before I came to Hilo to live.

Q. From 1911 to 1915 what were the transactions in a general way that his signature was *was* required and that you particularly observed?

A. If I recall he had a mortgage. I have no particular recollection to any one particularly, but at that time he was county treasurer, and I believe he had made out a lease, with the Trust Company, and in only that way I know his signature, but I believe that there are some documents in the office that bear his signature, but I just can't recall them now.

Q. You do not recall any special document?

A. I do not recall any. Matter of fact, all the transactions were of county affairs, and the fact that he was county treasurer.

(Testimony of H. B. Mariner.)

Q. Now, with reference to Defendant's Exhibit "I," the signature from which you state that you do not think that it is genuine, what are your grounds for that, will you state?

A. The general appearance of the signature particularly. [196]

Q. Well, what do you mean by general appearance?

A. The impression that it gives as a whole.

Q. The impression that it gives you as a whole, that it differs? A. Yes, entirely.

Q. Can you give more in detail as to the, as to this general impression?

A. Most likely. I would say that particularly throughout it differs, the letters do not resemble the letters as I know them, I mention no particular letter, and I believe that if it was examined closely under a glass you would see that in the general makeup. One would more likely see the difference under a glass, and I profess not to be an expert but just from a layman's point of view.

Q. Then for the same reason, that this signature and the general impression you have is that this is genuine.

A. The general impression is that it is genuine. May I see that one again?

The COURT.—Please hand Mr. Mariner Exhibit "I."

A. I know very little about handwriting but I do believe that if an examination was made under

(Testimony of H. B. Mariner.)

a glass, one could tell, as this seems that it has gone over?

Q. You mean retraced?

A. No, I mean going over the letters again. Let me show you (handed a pad and pencil).

Q. Then in your mind it appears that this signature had been gone over?

A. Well, I do not positively say.

That is all.

Mr. RUSSELL, on behalf of the plaintiff, rests.

The COURT.—At this time the Court will adjourn until ten o'clock to-morrow, January 27th, 1920. [197]

Tuesday, January 27th, 1920.

Mr. RUSSELL.—This document shows that T. K. Lalakea died intestate on the 7th day of May, and that Hannah Makaanai is entitled to some share in this estate. I would like to have the record show who the heirs of law are, and what their names are.

Mr. SMITH.—Well, I think that we can stipulate that the plaintiff, if she is entitled to any portion of this estate, that she has an one-eighth undivided interest.

Mr. SMITH.—It is stipulated that if she is entitled to any portion that she is entitled to an undivided one-eighth.

The COURT.—Don't you think it would be better to amend the stipulation by inserting the word "Plaintiff" instead of "She."

Mr. SMITH and Mr. RUSSELL.—No objection.

The COURT.—Let the stipulation appear of record.

The COURT.—Let the amendment appear of record.

Argument by Mr. SMITH and Mr. RUSSELL.

The COURT.—Excuses the witness until to-morrow morning at ten o'clock. Likewise excuses Mr. Swain, Hawaiian interpreter.

The COURT.—Will you gentlemen agree that this Motion for a Nonsuit has been read, and is a part of the record?

Mr. RUSSELL.—No objection.

Mr. SMITH.—No objection. [198]

[Title of Court and Cause.]

Motion for a Nonsuit.

Comes now Solomon K. Lalakea, the defendant above named, by his attorneys W. S. Wise and W. H. Smith, and moves this honorable Court for a judgment of a nonsuit herein upon the following grounds:

I. That the plaintiff has not presented any evidence herein in support of her declaration.

II. That the plaintiff has not introduced evidence sufficient to entitle her to a judgment by this Court in her favor.

III. That the plaintiff has failed to sustain all the necessary allegations in her declaration.

This motion is based upon all the pleadings, papers and files herein and upon the evidence introduced by the said plaintiff.

SOLOMON K. LALAKEA.

By W. H. SMITH (Sgd.),

By W. S. WISE (Sgd.),

His Attorneys. [199]

Wednesday, January 28, 1920.

L. 871.

Ruling of the Court on Motion for Nonsuit.

“The Court having gone over the authorities cited by defendant in support of the motion for a nonsuit and having no doubt in the mind of the Court that the testimony introduced by plaintiff is and would be sufficient for the Court to allow it to proceed to the jury under proper instructions, but this *being jury* waived the court is of the opinion that the authorities cited in support of the contention on the motion for a nonsuit merely gives weight of the evidence, it is therefore ordered that the motion for a nonsuit is overruled.”

Mr. SMITH.—We note an exception.

The COURT.—Let the exception be allowed.

Mr. SMITH.—Will the Court grant us time to file an interlocutory bill of exceptions to the motion of a nonsuit?

The COURT.—Defendant will be allowed until Saturday morning at ten o'clock within which to file an interlocutory bill of exceptions. [200]

Territory of Hawaii,
Island of Hawaii,—ss.

I hereby certify that the above is a true, correct, and complete transcript taken of my notes in the above-entitled cause.

RUTH A. QUINN,
Official Court Reporter, Fourth Judicial Circuit,
Territory of Hawaii.

Dated at Hilo, Hawaii, this 30th day of January,
A. D. 1920.

[Endorsed]: L. No. 671. Doc. 3, pg. 92. Filed at 8:30 o'clock A. M., January 30, 1920. Thomas Pedro, Jr., Clerk.

No. 1257. Rec'd and filed in the Supreme Court January 31, 1920, at 10:25 A. M. J. A. Thompson, Clerk.

No. 1345. Rec'd and filed in the Supreme Court Aug. 16/21, at 10:20 A. M. J. A. Thompson, Clerk.
[201]

[Title of Court and Cause.]

J. B. LIGHTFOOT, Esq., and RUSSELL & PATTERSON, Attorneys for Plaintiff.

W. S. WISE, Esq., and CARLSMITH & ROLPH, and W. H. SMITH, Attorneys for Defendant.

Transcript of Evidence.

Dated, at Hilo, Hawaii, this — day of — A. D. 1920. [202]

[Title of Court and Cause.]

June 28th, 1920.

J. B. LIGHTFOOT, RUSSELL & PATTERSON,
Attorneys for Plaintiff.

W. H. SMITH, Esq., W. S. WISE, Esq., and CARL-
SMITH ROLPH, Attorneys for Defendant.

Mr. CARLSMITH.—Reads motion for a con-
tinuance. Argument.

Mr. RUSSELL.—Argument in answer to Mr.
Carlsmith.

Mr. CARLSMITH.—Asks permission to put
Judge Wise upon the stand so as to corroborate
certain statements contained in the motion.

The COURT.—The request is granted.

Testimony of Judge Wise, for Defendant.

Judge WISE, called, sworn and examined.

Direct Examination by Mr. CARLSMITH.

Q. Judge Wise, how old are you?

A. A day after to-morrow I will be 65.

Q. How long have you been practicing before
the Courts of the Territory? A. 34 years. [204]

Q. During the early part of these cases, the La-
lakea cases you were acting as legal adviser?

A. Yes.

Q. Present in court during all of these cases?

A. Yes, sir.

Q. Judge Wise, what has been the condition of
your health during the last two years?

A. Well, I have had no serious illness but during
the last two years, my hearing has been affected.

(Testimony of Judge Wise.)

Q. What do you mean by that, Judge Wise?

A. Well, I have become deaf.

Q. When did this deafness come to you?

A. It has been coming on but became quite noticeable during the past two years.

Q. During the past two years you have been in constant attendance by your physician?

A. Dr. Rice has attended to me.

Q. He is a physician, that is a nose and eye and ear physician. A. Supposed to be.

Q. Well, how many times have you called upon Dr. Rice to attend to you?

A. Well, I have gone to his office for treatment, and he has given me home treat which I use myself.

Q. Judge Wise, with the present extent of your deafness are you able to carry on work in the Circuit Court?

A. Well, I have carried on uncontested cases, probate matters and uncontested divorce cases, small matters like that, but when it comes to cases that are likely to be contested I have to recommend another attorney, for it is impossible for me to hear everything that goes on and what is said.

Q. During the past 11 days you have been in court during the trial of these cases, the probate matter of the estate of [205] Lalakea, which had been up for consideration at that time, and the trial of the other cases? A. I have been.

Q. I will ask you whether or not you were able to hear everything that had been said by the Circuit Judge?

(Testimony of Judge Wise.)

A. Well, at times I was able to hear, and then again I could not, and I would have to ask somebody.

Q. Then what I understand Judge Wise is that in uncontested cases, you are able to try but anything that requires careful attention you are not able to understand or rather hear all?

A. That is correct.

Q. How recent was it that you had to give up handling cases of this nature? A. This morning.

Q. I mean, how long has it been since you were interested in any cases that required much careful attention of the same.

A. For the past two years I have been unable to handle anything like that.

The COURT.—You tried the Garcia murder case?

A. Well, that is my recollection that it is the last big case that I had in this Court; I know of no other.

Q. And that case was tried was it not? A. Yes.

Q. Judge Wise, you were interested in the trial of those defendants that were tried out at Honokaa, thru some misunderstanding of the Judge out there, they were brought to this court?

A. Yes, I remember.

Q. And you were successful in their *equitale*?

A. Yes, there was no trial in this court.

Q. But the motion that you presented was finally ruled in your favor? [206]

A. The motion, yes.

Q. You conducted the motion in this case?

(Testimony of Judge Wise.)

A. Yes.

Q. Now, ultimately, didn't you go out to Honokaa at the trial of these cases? A. I did.

Q. And you conducted your own trial? A. No.

Q. You have presented probate matters here since the return of the present Judge? A. Yes.

Q. You apparently did not have any disadvantage in hearing the Shipman Probate case, did you?

A. I was able to hear what was said.

Q. Now, Judge, I do not want you to think that I am trying to put you in a corner and think that you are trifling with the truth; I want to be perfectly fair with you.

A. And that I think so, your Honor.

Q. This Court has the highest opinion of you, Judge Wise, and no reason to believe otherwise.

Q. I quite agree with you, your Honor, and of recent years I have attempted to handle no other than probate and divorce cases which require very little attention; if it is a case that requires very much careful attention I suggest that either the parties employ another counsel or one to assist me.

Q. Now, what case have you in mind at the present time (Mr. Carlsmith).

A. Well, to be perfectly frank with you, the recent case tried before this Court, the Lalakea estate case.

The COURT.—Judge Wise, you are quite familiar with the affairs and condition of things that is with the estate of T. K. Lalakea, deceased, ever since Solomon K. Lalakea was [207] adminis-

(Testimony of Judge Wise.)

trator of his father's estate; in fact, since the beginning of this suit, if anyone has any knowledge of the affairs, it is you? A. That is true.

Q. And you were leading counsel from the very first until the present date, in the case of *Hannah Makainai vs. Solomon K. Lalakea*? A. Yes.

Mr. CARLSMITH.—At the trial of that case, Judge Wise, let me ask you if you had assisting counsel? A. Yes, W. H. Smith.

The COURT.—Judge Wise, isn't it a fact that your name appears on the record of the Supreme Court, as leading counsel for the named parties?

A. I think my name appears on all of the papers.

Q. And when this matter was presented in the Supreme Court, you were present?

A. No, not personally.

Q. But your name appeared on the records?

A. I think so.

Mr. CARLSMITH.—Mr. Smith, Mr. Wise you were present at the trial and hearing of this case that is *Hannah Maikainai vs. Solomon K. Lalakea*?

A. Yes.

Q. And you took no active part in the trial of that case?

A. No, but I was present every day of the trial.

Q. Now, Judge Wise, at the inception of that case, who actually *trial* that case, who presented the matter before the Court at that time?

A. Mr. W. H. Smith.

Q. Did you offer any suggestions?

(Testimony of Judge Wise.)

A. Yes, Solomon K. Lalakea and myself.

—of the different suits, your name [208] appears as leading counsel?

A. Yes, and at times when we would come to something that required looking into the law, I would look it up with Mr. Smith and he prepared the briefs.

Q. You consulted with Mr. Smith on different points of law? A. Yes, I prepared the briefs.

Q. And in regards as actually presenting the case.

A. Well, I was always present in court.

Q. You were merely present at the time of the hearing and took no particular notice of what the witnesses were saying.

A. Exactly. I was present all the time.

Q. What preparation have you made with regards the trial of this case.

A. Nothing, other than what I have given you in the matter, in such a short time.

Q. As a matter of fact, Judge Wise, have you consulted with any of the witnesses that are to be called in the trial of this case?

A. I think not; if there was any consultation it was either in the presence of Mr. Smith, he was present. I believe that I did question Mr. Nama-hoe, but he was the only one.

Q. So as a matter of fact, you have made no preparation for the trial of this case?

A. No, as I said before, I would consult with Mr. Smith and if there were any questions of

(Testimony of Judge Wise.)

law, I would look them up, and then consult him; that is about all that I did.

Cross-examination by Mr. RUSSELL.

Q. Do you recall that at the time when plaintiff rested its case and then you were asked if you were ready to proceed to trial you stated that you were?

A. Well, if the records say so, yes. [209]

Q. You stated at that time that you were ready to go to trial. A. That is my understanding.

Q. You knew at that time, Judge Wise, what the evidence was you heard it all?

A. Well, I know there were witnesses but so far as what they said I do not.

Q. You had at intervals interrogated different witnesses, had you not?

A. My understanding is that I did not talk with any of the witnesses myself, except Mr. Namahoe, and all other witnesses were present when Mr. Smith was in my office or I in his.

Q. You interviewed Mr. Keolanui?

A. I think Mr. Keolanui was one of the men that I talked to.

Mr. CARLSMITH.—Judge Wise, did you understand what Mr. Russell said to you, at the beginning of his cross-examination? A. I think so.

Q. What was it he said?

A. Well, my recollection is that upon the close of the plaintiff's case, at the presentation of the case, he turned to some document or paper and read from that, that at the close of the case, he

(Testimony of Judge Wise.)

stated that Mr. Smith was asked that when this case was continued again, it would be as a whole or something like that, or to that effect.

A. I suppose that what he read from the transcript I do not know.

Q. You were present at the trial of that case?

A. Yes, I was present.

Q. Judge Wise, isn't it a fact that you have had ample opportunity to discuss this case with Mr. Carlsmith?

A. I might say that I had very little time to talk with him about this case, because of the fact that we were [210] interested in the trial of another case at that time.

Q. Isn't it a fact that you have discussed with Mr. Carlsmith every phase of this case, or is there something that he knows of and which you have no knowledge?

A. Well, there might be, but I think I have told him everything that I know.

Q. Did you have a consultation with Mr. Carlsmith, a week or so ago, on a Saturday?

A. It was a Saturday that I had this consultation with Mr. Carlsmith with regards to the probate case, and the Lalakea Todd case.

Mr. CARLSMITH.—Judge Wise, I will ask you again, if as a matter of fact you were not in your office one evening, and at that time we had a discussion? A. Yes.

Q. And you were present that evening? A. Yes.

(Testimony of Judge Wise.)

Q. And as a matter of fact were you present in your office one Sunday morning, and remain in your office for some considerable length of time?

A. Just a moment. I was down a week ago yesterday from nine o'clock until 11 o'clock.

Q. And you also informed me that I could call upon you at any time during the day or evening?

A. I did.

Q. And during the evening up to nine o'clock?

A. That is correct.

Q. And during all of these discussions that we have had, they were relative to the probate cases and the Todd Lalakea case.

A. Nothing else.

The COURT.—As a matter of fact, there has not been a day that you [211] have not consulted with Mr. Carlsmith with regard to this case.

A. Well, we have had consultations.

Q. And those occurred every day?

A. I would not say all, every day.

Q. Mr. Wise, you recall the time of the trial of the Lalakea case? A. Yes.

Mr. CARLSMITH.—What time of the day was it, Judge Wise, when you came down to your office on that Sunday? A. Between eight and nine.

Q. And you had a consultation with me relative to the witnesses as to what the witnesses would testify to? A. Yes.

The COURT.—You have been leading counsel since the inception of this case?

(Testimony of Judge Wise.)

A. As far as I know.

Q. Isn't it a fact, Judge Wise, that you are aware of all the facts and things pertaining to this case?

A. I cannot answer that. I do not know what Mr. Smith knows about the case.

Q. Judge Wise, when Mr. Smith came back from Honolulu, did *you* inform you that the present Judge was present at the hearing of this case in the Supreme Court? A. Yes, he did.

Q. Did Mr. Smith inform you that Judge Quinn was present? A. Yes.

Q. And at that time did Mr. Smith inform you that the present Judge was so physically incapacitated that no large cases would be tried before the summer vacation?

A. I have had very little talk with Mr. Smith before he left [212] that I went down to the wharf so as to be able to talk with him but was unable to do so.

That is all.

The COURT.—At this time the Court will take a recess for a few moments as I have some juvenile cases which I feel should be disposed of. Mr. Carlsmith, I will have the bailiff phone to you and likewise to you Mr. Russell.

Recess.

The Court's ruling on the motion for a continuance.

The COURT.—The ruling on the motion and affidavit and oral evidence on the motion for a con-

(Testimony of Daniel Namahoe.)

tinuance; the court feels that this motion is largely discretionary and that it has been dispelled by the oral evidence of Judge Wise and that being the only reason presented at this time why the motion should not be granted. The motion is therefore overruled.

Mr. CARLSMITH.—We note an exception.

The COURT.—Exception allowed. [213]

Mr. CARLSMITH.—If your Honor please, we have only two witnesses, the defendant and another witness, and the evidence we have to offer will only take a day to present.

The COURT.—Mr. Carlsmith, have you any objection if the Court continues the trial of this case until 1:30 P. M.

Mr. CARLSMITH.—That is my object, if your Honor please, to have the case continued until the afternoon.

The COURT.—The trial of this case will be continued until 1:30 P. M.

Recess at this time. [214]

AFTERNOON SESSION.

June 28th, 1920, 1:30 P. M.

Testimony of Daniel Namahoe, for Defendant.

Mr. DANIEL NAMAHOE, called, sworn and examined on behalf of the defendant, Solomon K. Lalakea.

Direct Examination by Mr. CARLSMITH.

Q. Where do you reside? A. Waiakea.

(Testimony of Daniel Namahoe.)

Q. How long have you resided in Hilo?

A. This is my birthplace.

Q. You were born here, this is your birthplace, how old are you Mr. Namahoe? A. 60 years.

Q. Mr. Namahoe, did you know Mr. T. K. Lalakea during his lifetime? A. Yes.

Q. He was a resident of Hilo and was a resident for a great many years, was he not?

A. He lived here and lived in Wainaku.

Q. He resided in a place called Mokuhowia?

A. Yes.

The COURT.—Where is that?

Mr. CARLSMITH.—On the Waiakea side of Haheo.

Q. That is a mile or a mile and a half from the Hilo Postoffice? A. About that.

Q. How long did you know Lalakea?

A. Twenty years and over.

Q. Were you on intimate and friendly terms with him during these twenty years? A. Yes, I was.

Q. You were friendly and called at his home?

A. Yes.

Q. I will ask you if you remember being called to go to his [216] home here in Hilo some time in March, 1915? A. Yes.

Q. How did you come to go there on that day?

A. At first I did not know what I was wanted for but when I came to the house then I found out what I was wanted for.

Q. Do you know who it was that came for you?

A. Yes.

(Testimony of Daniel Namahoe.)

Q. Who was it? A. Solomon.

Q. The defendant in this case? A. Yes.

Q. What was your employment at that time?

A. At the market, I had charge of the market.

Q. That is the—that is, you were fish inspector, were you not? A. Yes.

Q. About what time of the day did Solomon come after you?

A. About eleven o'clock, between eleven and twelve.

Q. Did you return to the house with him or did you follow him at a later time?

A. It was, I followed afterwards.

Q. Where was Solomon's—Lalakea's house at that time? A. Over there.

Q. Do you know what street that is called?

A. I believe it is Kinoole Street.

Q. Kinoole Street?

A. That is what, I think.

Q. It is on the Makai side of the street?

A. Yes.

Q. And it is on the Waiakea side of the Weary premises, is it not? A. Yes. [217]

Q. And on the Honokaa side of the premises formerly occupied by Judge Hapai? A. Yes.

Q. When you got to the house who was there?

A. Solomon Lalakea.

Q. The elder Lalakea's name was Kanamu Lalakea? A. Yes, Kanamu.

Q. And it was also Thomas, was it not?

A. Yes.

(Testimony of Daniel Namahoe.)

Mr. CARLSMITH.—If your Honor please, I think that he was called, that is, his baptismal name was Thomas K. Lalakea, but he was called Kanamy by the Hawaiians and known by that name.

Q. You say there was present Kanamu and Solomon Lalakea, was anyone else present there at the house? A. I do not remember.

Q. Do you know Hannah Makainai? A. Yes.

Q. Was she there at the time?

A. I do not remember that she was there.

Q. Do you know Mrs. Hewahewa whose name was Lily? Do you know her? A. Yes.

Q. Was she present at the time?

A. I do not remember.

Q. When you arrived at the house did you have a conversation with Kanamu?

A. Yes I had a talk with him.

Q. What did he say?

A. He wanted me to go there to be a witness to various documents that were before him.

Q. What kind of documents were these?

A. He told me they were partitional deeds. [218]

Q. Partition to what?

A. Partition deeds of the family.

Q. Did he execute these deeds or sign them?

Mr. RUSSELL.—That is objected to, if the Court please, as it calls for a conclusion of the witness.

The COURT.—Answer the question.

Mr. RUSSELL.—Note an exception.

The COURT.—Exception allowed.

A. The documents were written and were signed.

(Testimony of Daniel Namahoe.)

Q. Who signed them? A. Kanamu did.

Q. Now, where was he sitting when he signed them? A. At the head of the table.

Q. Do you know how many deeds Kanamu had before him at the time it was executed?

A. I do not remember how many.

Q. Were there more than one? A. Yes.

Q. When you say that Mr. Lalakea was sitting at the head of the table in what room was he sitting?

A. In the room on the Puna side of the house.

Q. Mr. Namahoe, I will show you a sketch which was drawn and will point out the location so as you can give the direction of the street and the house.

A. That is the street.

Q. The street runs in this direction at right angles to the front of the court house, does it not?

A. That is the street running here?

Q. Keawe Street? A. Yes.

Q. Yes, what is written in here as "Keawe Street" indicates the road? A. Yes. [219]

Q. And this written here, the words *Mauka* shows the direction toward the mountains? A. Yes.

Q. And this direction alongside the paper is the direction towards Puna? A. Yes.

Q. Now, as you come on these steps in front of the house what do you approach first?

A. Approach the house.

Q. A veranda, Lanai or what?

A. The steps of the veranda?

(Testimony of Daniel Namahoe.)

Q. Now, what kind of a room is this off the Lanai? A. The parlor.

Q. Off from the parlor there is another room on the puna side? A. Doorway.

Q. Now, Mr. Namahoe, I want you to point out as near as you can where that table was at which Mr. Lalakea sat when he signed these deeds.

A. This is the veranda here, this is the room here.

Q. Indicated by the words "dining-room."

The COURT.—What is the date of the death of Mr. Lalakea, Mr. Carlsmith.

A. 7th of May, 1915.

Mr. CARLSMITH.—We offer in evidence, if the Court please, this sketch which has just been testified to by this witness, giving the various positions of the rooms.

The COURT.—Any objection.

Mr. RUSSELL.—No objection.

The COURT.—The sketch may be received in evidence and marked Defendant's Exhibit 2.

Q. Now, Mr. Namahoe, I will ask you to examine Defendant's [220] Exhibit 1, particularly at the end of the exhibit where the words are written "Thomas K. Lalakea," did you see that written? A. I was there.

Q. Did you see it written?

A. I saw it written.

Q. Who wrote the words "T. K. Lalakea" there? A.

A. Lalakea and his son.

Q. What do you mean by Lalakea and his son?

(Testimony of Daniel Namahoe.)

A. This is the reason of that. Mr. Lalakea could not write himself so he asked his son to assist him.

Q. What did Lalakea do?

A. He had that written.

Q. The first two letters "T. K."—state whether or not this was written by Kanamu without the assistance or whether or not Solomon assisted him in that? A. He was assisted in all.

Q. He was assisted in all? A. Yes.

Q. I will ask you to examine Plaintiff's Exhibit "A" and state whether or not the name "T. K. Lalakea" was written by someone else present and if so by whom.

A. He was assisted when he wrote that.

Q. By whom? A. His son Solomon.

Q. After he had written his name with the assistance of his son what did you do?

A. He then asked me to sign my name.

Q. For what purpose

A. As a witness to this document.

Q. And the words "Dan Namahoe" as they are written here were written by you?

A. I wrote that. [221]

Q. And the name of Solomon K. Lalakea written after that who wrote that name?

A. He did.

Q. At whose request?

A. Kanamu asked him to.

Q. The names as they appear in Plaintiff's Exhibit "A" and Plaintiff's Exhibit "B," Dan Nama-

(Testimony of Daniel Namahoe.)

hoe and Solomon K. Lalakea, were written by the persons possessing those names?

A. That is Exhibit "A"?

Q. That was written by you? A. Yes.

Q. And Solomon Lalakea? A. Yes.

Q. Now, showing you Exhibit "B" who wrote that word "S. Namahoe"?

A. That is not S. it is Dan.

Q. I mean Dan Namahoe and the names Solomon K. Lalakea was written by you and Solomon Lalakea? A. Yes.

Q. Mr. Namahoe, you say that Kaunamu was unable to write at that time what was his difficulty?

A. He was weak he was sick and weak.

Q. He had been sick for how long a time do you know?

A. Yes, he had been sick quite a long time.

The COURT.—What is the date of Exhibit "I" Mr. Carlsmith?

Mr. CARLSMITH.—6th of March, 1915.

Q. At the time that Kanamu executed these instruments did he tell you the contents of them?

A. He told me of them.

Q. You stated a moment ago that he made the statement to you that this was a division of the property among his family, he told you that he had provided for them? [222]

A. He did not; all he told me that this is a division of the property.

Q. Do you know whether or not he had divided it

(Testimony of Daniel Namahoe.)

equally or whether or not one of the children got a greater share than the other?

A. What I remember is, that he had made a division of the property.

Q. Do you know of any reason why he made such a division?

Mr. RUSSELL.—That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question.

Mr. RUSSELL.—Note an exception.

The COURT.—Exception allowed.

A. Yes.

Q. What was it?

A. It was the child that he had confidence in and one that would care for the property.

Q. How long after Mr. Lalakea—now after Mr. Lalakea had signed these papers what did he do with them?

A. He then signed and then Solomon signed.

Q. Then what did Kanamu do?

A. He then gave the papers over to his son and told him to take very good care of them and if he should die to have them acknowledged.

Q. About how long were you there at that time?

A. I think about half an hour probably a little more.

Q. About what time of the day was this?

A. Before noon.

Q. After you had finished what did you do?

A. I went back to work. [223]

(Testimony of Daniel Namahoe.)

Cross-examination by Mr. RUSSELL.

Q. You say that at the time that Solomon came after you you were at the fish market?

A. Yes.

Q. That is some distance from your home, is it not? A. Yes.

Q. And you go from one fish market to another?

A. Yes.

Q. So far as you know Solomon had to make some search for you before he found you?

A. I cannot answer that question.

Q. The fish market is down at Waiakea with respect to the market where you were working.

A. No, this is the market—I believe they call the Ahip Market.

Q. Do you remember whether or not Solomon had told you at that time that he had been looking for you?

A. He did not say that he had looked for me.

Q. You say that you did not know what you were wanted at the house until you arrived at the house?

A. Yes; that is, I did not know what I was wanted for.

Q. As a matter of fact, you call at the house nearly every day or so is that not so?

A. Yes, sometimes I go there.

Q. You had gone there on an average of once a day? A. Yes, sometimes.

Q. Isn't it a fact that in the last three months of Lalakea's life you, and while he was ailing you went there every day?

(Testimony of Daniel Namahoe.)

A. Not all the time sometimes when I had work I would not visit him.

Q. Isn't it a fact that you would visit him for every day for three weeks and then miss one or two days, is that [224] not the situation?

A. Yes, like that.

Q. With respect to the day you signed as a witness to these deeds were you there the day before?

A. I cannot remember whether I was there or not; it was so long ago.

Q. When you arrived at the house you say that it was—that the papers were all ready to be signed and executed?

A. Yes, when I got there the papers were ready.

Q. And Mr. Lalakea was seated in a chair at the table? A. Yes, he was at the head of the table.

Q. Was Solomon seated at the head of the table?

A. Solomon was at the table.

Q. And was there anyone else at the table?

A. I was there present.

Q. About how long after Solomon asked you to go up to the house was it that you started for the house?

A. I don't remember how long it was before I waited.

Q. When Solomon came to get you to go to the house and you followed him to the house was it more than an hour give us your best recollection.

A. No, I do not think it was an hour; possibly about ten minutes.

(Testimony of Daniel Namahoe.)

Q. Had you before that day been asked to sign any documents?

A. I was never asked—that was the only time; it was when I arrived at the house I was asked.

Q. You were not asked after that, were you?

A. Asked after what?

A. After that day were you ever asked to witness any signatures of T. K. Lalakea to any documents?

A. I don't know about that; I cannot remember.

Q. Now, you say that old man Lalakea was too weak to sign himself, is that correct? [225]

A. I noticed that he was sick; he was sickly and that was the reason he asked the assistance of his son.

Q. Now, the best of your recollection, when was the next time after the execution that you saw old man Lalakea, how long after that?

A. I saw him again a few days after that.

Q. Was he any better or was he getting worse until the time he died?

A. Sometimes looked better and then again sometime he would look weaker.

Q. With reference to the apparent condition of Mr. Lalakea on this day, do you recall whether you say him any stronger after that?

A. I cannot say whether he was more stronger, but sometimes he seemed to be a little better by his talk, then sometime to be weaker.

Q. Well, on this particular day he was not, there was not—there was no substantial difference in his

(Testimony of Daniel Namahoe.)

condition from what he was a few days before or a few day *after* was there?

A. It is hard for me to answer that question, at the present time because it is so long ago.

Q. Well, I will ask you this question; when you appeared at the house in answer to a summons and before Mr. Lalakea undertook to make these signatures did you notice any substantial change in his condition? A. Change for what?

Q. For the worse?

A. I would not say so, because at times he looked all right then times he was not so good, then a change for the worse.

Q. On that day did he talk as easily and with as much [226] apparent strength as he had the last time you saw him?

Q. Yes, his face it was stronger and when he spoke, that is why—

Q. You say you were there for an hour or so?

A. Yes, as far as I know.

Q. Did you see Mr. Lalakea walk around in the room, get up from the table to walk around?

A. I did not see him walk about when I was there he was at the table; whether he walked after that I do not know.

Q. You say that Mr. Lalakea asked you to sign as a witness to each of these instruments, did he ask you to act as a witness after he signed or was it before he signed that he asked you to be a witness?

A. That he signed?

(Testimony of Daniel Namahoe.)

Q. You said that Mr. Lalakea asked you to be a witness to these now when was it with respect to the signing; was it before he signed or was it after?

A. At the time he told me he wanted me to be a witness?

A. Well, then, after Mr. Lalakea signed as you described, did he again ask you to sign as a witness?

A. No, first time he asked I signed and after he signed I signed, he did not ask me again.

Q. And you recall distinctly as having asked Solomon to sign as a witness also? A. Yes.

Q. Now, when you had this conversation with old man Lalakea with respect to the contents of the deeds and the reason for preferring Solomon as grantee, did Solomon take any part in the conversation?

A. No, after the papers were signed with the assistance of Solomon, they were given to him and he was told to care for them. [227]

Q. Did Solomon have anything to do with regards to that? A. I do not remember.

Q. No?

A. I don't know might have had after I left when they were by themselves, I do not know.

The COURT.—Mr. Namahoe, did you visit Thomas K. Lalakea's residence from the date of the signing of this deed to the date of his death, as frequently as prior to that time?

A. Yes, I visited him.

(Testimony of Daniel Namahoe.)

Q. Did he grow weaker and weaker so that he was unable to get about?

A. After that I noticed his failure.

Q. Would be unable to sign any documents without assistance?

A. That I am not able to answer as I saw no documents after that?

Q. You saw no documents after that? A. Yes.

Q. Answer the question?

A. That is what I think.

Mr. RUSSELL.—What do you think?

A. That he could not sign as well as he could formerly.

The COURT.—How was it necessary for Solomon to assist his father on the 6th day of March, 1915?

A. I think that was the desire of his father.

Q. Please answer the question. Was it necessary for Solomon to assist Thomas K. Lalakea on March 6th, 1915, when these deeds are alleged to have been signed? A. Yes.

The COURT.—Mr. Namahoe you desire to be understood as testifying that Thomas K. Lalakea on March 6th, 1915, was unable to sign the deeds in question without the assistance of his son Solomon? [228]

A. That is my belief because he could not.

Q. Had you visited him very frequently after that until the time he passed away the 7th of May, 1915? A. Yes.

(Testimony of Daniel Namahoe.)

Q. And further if Mr. O. T. Shipman has testified that on the 20th of March, 1915, he took Thomas K. Lalakea's acknowledgment he is mistaken?

A. The signing of T. K. Lalakea on that document?

Q. Please read the question. "And further Mr. O. T. Shipman has testified that on the 20th of March, 1915, he took Mr. Thomas K. Lalakea's acknowledgment he is mistaken?"

A. You will have to excuse me about that, I do not know anything about that.

Mr. RUSSELL.—I show you Defendant's Exhibit "I," which is the deed testified to by you from T. K. Lalakea to Solomon K. Lalakea, and ask you when, if you saw these, and will ask you if you know who inserted the figure "6" on the first line and the word "March" 1915. I will ask you if you know who inserted the figure "6" and the word March, 1915?

A. I cannot tell I did not see it inserted.

Q. It was written in at that time. A. Yes.

The COURT.—Do you want your—do you want to be understood that "March 6th, 1915," had been inserted prior to your arrival?

A. What I remember is that it was there, this March 6th.

Mr. RUSSELL.—Mr. Namahoe, you are a debtor of Solomon's, are you not?

A. I do not owe him anything. Who said I owed him?

(Testimony of Daniel Namahoe.)

Q. At the time that you signed as a witness to these deeds did you owe T. K. Lalakea any money?

A. I do not owe him. [229]

Q. Do you owe Solomon any money? I do not owe Solomon.

Q. Have you borrowed any money from Solomon since the old man's death? A. Money?

Q. Yes.

A. I never got any money from him.

Q. Do you own the land that you are living on or does Lalakea own it? A. It is my own.

Q. And has Lalakea a mortgage on it?

A. On my land?

Q. Yes. A. No mortgage on that land.

Q. Did you get that land from Mr. Lalakea?

A. I got it from the Government.

Q. Did Lalakea help you with some money at the time you got it from the Government?

A. No, my own money.

Redirect Examination by Mr. CARLSMITH.

Q. Mr. Namahoe, I will ask you what it was that Thomas K. Lalakea said at that time to Solomon Lalakea at the time that he gave the deeds.

A. "Take good care of these papers, when I pass away have them probated then give each their share."

The COURT.—Mr. Namahoe, you do not pretend to know the exact words used by Mr. Lalakea at that time when he gave these deeds to Solomon?

A. At that time?

(Testimony of Daniel Namahoe.)

Mr. CARLSMITH.—Give us in your words what you remember Kanamu said at that time.

A. At that time after the signing of our names he gave all these papers to Solomon and told him to “take care of these [230] papers, if I should pass take these papers, have them probated and give each its share.”

Mr. CARLSMITH.—What is the word used for probated?

Mr. SWAIN, Interpreter.—Hooiaio.

Q. What is the word used for acknowledged?

A. The same word is used.

The COURT.—Mr. Namahoe, you are not able to give us the exact words used by T. K. Lalakea, but this is your best judgment.

A. I am telling what I remember what he said at the time I remember well the word “Hooiaio” but it has been so long ago.

Recross-examination by Mr. RUSSELL.

Q. And you remember well, do you, that the old gentleman cautioned Solomon that upon his death or the event that he should die he should give each his share, you remember that expression?

A. After he passed away to have it acknowledged and then give each its share.

The COURT.—As a frequent visitor can you tell me who else resided in that home with T. K. Lalakea? A. Yes, Hannah.

Q. Hannah Makainai? A. Yes.

Q. Who else?

A. There were others in the house, his daughters.

(Testimony of Daniel Namahoe.)

Q. Mrs. Hewahewa she was there?

A. I saw her sometimes.

Q. Can you account for the absence of any of the members of the family at the time these deeds were witnessed by you? A. I cannot say.

Recess for five minutes. [231]

Testimony of Solomon K. Lalakea, for Defendant.

SOLOMON K. LALAKEA, called, sworn and examined.

Direct Examination by Mr. CARLSMITH.

Q. What is your name?

A. Solomon K. Lalakea.

Q. You are the defendant in this case, are you?

A. Yes.

Q. Mr. Lalakea, how old are you at the present time? A. About 33 over.

Q. Where were you born? A. Mokohunui.

Q. That is a place just outside of Hilo?

A. Yes.

Q. At Wainaku?

A. About one mile and a half from here.

Q. Did you live there all the time?

A. Well, most of the time I was in school.

Q. Where? A. Honolulu.

Q. In what school?

A. St. Louis, Kamehameha and Punahou.

Q. St. Louis and Punahou?

A. No, St. Louis, Kamehameha and Punahou.

Q. You are the only member of your family that was educated in these various schools?

(Testimony of Solomon K. Lalakea.)

A. Yes, sir, I am.

The COURT.—You mean you are the only one of the boys? A. I have one brother?

Q. What is his name? A. George Lalakea.

Mr. CARLSMITH.—Your brother is in Honolulu now? A. Yes.

Q. And you have sisters? [232] A. Yes.

Q. Mr. Lalakea in January of 1915 where were you living. A. In Honolulu.

Q. What was your occupation?

A. Postoffice clerk.

Q. Mr. Lalakea, did you hear the testimony of Paul Hewahewa explain the reason why you came to Hilo? A. Yes, sir.

Q. What was the reason—in what part of 1915, in January, 1915? A. Later part of January.

Q. What was the reason that you came back to Hilo?

A. My father's request to come back and look after his work.

Q. How did your father request you to come?

A. He wrote me a letter.

Q. How do you fix the time as to the receipt of your father's letter?

A. I do not know where the letter is now. I put it in my coat pocket when I came up from Honolulu.

Q. Your return was almost immediately after the receipt of that letter? A. Yes.

The COURT.—When did you arrive in Hilo?

A. I think the last of January.

(Testimony of Solomon K. Lalakea.)

Q. 1915? A. Yes.

Mr. CARLSMITH.—After your return—have you made a search recently to look for that letter?

A. Yes, I did.

Q. And you believe you cannot find your father's letter.

A. I think I cannot find it, for at that time my sister Hannah looked after my clothes at that time. [233]

Q. Can you fix the date of the receipt of your father's letter have you got any letters which were sent to you after that time? A. No, I have not.

Q. I will ask you to look at this.

A. Last letter I wrote him.

Q. This letter was written by you to your father?

A. Yes.

Q. What date? A. January 27th, 1915.

Q. In receipt of this letter to you requesting you to come home and this is the letter which you wrote in answer to his letter? A. Yes.

Q. The letter is in reply to the last letter written by your father? A. Yes.

Q. The letter under date of January 27th, 1915, was mailed by you? A. Yes, mailed by me.

Q. Where? A. Postoffice.

Q. Where? A. Honolulu.

Q. Where did you get this?

A. I searched and found it in the bureau.

Q. When?

A. After my sister accused, my brother-in-law, said requested me to come back.

(Testimony of Solomon K. Lalakea.)

Q. Your brother-in-law,—what is his name?

A. Paul Hewahewa. [234]

Mr. CARLSMITH.—I desire to offer in evidence this letter which has just been identified.

The COURT.—Any objection.

Mr. RUSSELL.—The offer is objected to, if the Court please, upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled. The letter may be received in evidence and marked Defendant's Exhibit 3 and 4—the letter to be marked 3 and the envelope 4.

Mr. RUSSELL.—We note an exception.

The COURT.—Exception allowed.

Mr. CARLSMITH.—I will read the letter so as it will be in the record.

“Honolulu, Oahu, Jan. 27, 1915.

Dear Papa:

I received your letter with surprise in hearing that you are not feeling well. I will come home as you requested but before I leave my work I will have to ask the Postmaster for a month's leave of absence. But it is necessary for me to resign altogether then I will file my resignation.

I am well and hope you will improve in health soon. I am worried over your condition and so cannot collect my thoughts properly.

With aloha to you and the family,

I am your loving son,

SOLOMON LALAKEA.

P. S.—In a hurry to mail excuse my writing.”

(Testimony of Solomon K. Lalakea.)

Q. Mr. Lalakea, you say that this letter which has been lost was written requesting you to come to Hilo; what was your father's work then? It was a request to come and look after his work?

A. Yes.

Q. What work was there to look after? [235]

A. To enter up rents, notes and mortgages.

Q. Did you ever do this work for your father before this time.

A. Yes, when I came back from school.

The COURT.—You mean during your vacations?

A. Yes.

Mr. CARLSMITH.—When you returned to Hilo the last time, what did you notice the condition of your father?

A. It was very much better, he was much stronger.

Q. Did he have strength to go out of the house and transact business after that? A. No.

Q. Did he leave the house any time after the first of February until his death?

A. He and I took a walk down Front Street.

Q. You and he walked down Front Street?

A. Yes.

Q. Frequently?

A. I think two times in that month.

Q. In February he walked down town twice?

A. Yes, sir.

Q. Mr. Lalakea, do you know when the deeds, which are in evidence here and marked Defendant's Exhibit "I," which is a deed from your father

(Testimony of Solomon K. Lalakea.)

to you and the Plaintiff's Exhibit "A" and "B," which are the deed from your father to the three sisters and one of them to your brother George, do you know when they were made, when they were drawn?

A. He did not tell me, after I arrived at the house, my father's home, the deed were there.

Q. Did you see them? A. Yes, I did.

Q. Mr. Lalakea do you know whether or not your father had [236] had in mind any time prior to your arrival home the division of this property?

Mr. RUSSELL.—Objected to upon the ground that it is incompetent.

The COURT.—Answer the question.

Mr. RUSSELL.—Note an exception.

The COURT.—Exception allowed.

A. Yes, as far as I know.

Q. When did your mother die?

A. Mother died in August 24, 1914.

Q. Which was less than a year from the time your father died? A. Yes.

Q. Mr. Lalakea, on the day after your mother's death, do you know whether or not your father called together the family to discuss the disposition of his property? A. I was there at the time.

Q. Who else was there?

A. Mr. Hewahewa and his wife, Hannah Makainai and Mrs. Aiona, Mr. Lalakea and some grandchildren.

Q. Do you know whether or not there was any-

(Testimony of Solomon K. Lalakea.)

thing said at that time about making a disposition of this property before his death? A. Yes.

Q. What was the conversation which occurred at that time between all of the members of the family.

Mr. RUSSELL.—Objected to upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question.

Mr. RUSSELL.—Note an exception.

The COURT.—Exception allowed.

A. We were called together in a room in the parlor at his country home, out in the country.

Q. Which is near Haheo? [237]

Q. What did your father say?

A. He wanted to find out about the manao of.

Q. That is their opinion?

A. About his estate that is his property.

Q. Did he ask each of them?

A. He asked each one of us.

Q. Which was the first child asked?

A. I think Mrs. Hannah Makainai.

Q. What did she say?

A. She said that she did not want anything from my father because she loved my father, and then she had enough to live on, that it was best to give to the younger children.

Q. She is married? A. Yes.

Q. Who next? A. Marie.

Q. Was she married then? A. No.

The COURT.—Was Marie married or unmarried? A. Unmarried, single.

(Testimony of Solomon K. Lalakea.)

Q. What did Mrs. Makainai, your sister Lilly say?

A. She said that she had an opinion but that she did not want to tell it because the family was present.

Q. Said she had an opinion? A. Yes.

Q. And that she did not want to tell it before the family? A. Yes.

Q. What did your father say?

A. He was very angry, and my father asked her what she wanted in this property.

Q. Did she say anything?

A. She said she would not tell until the next day. [238]

Q. Well, who next? A. Mrs. Aiona.

Q. That is Jeanny? A. Yes.

Q. What did she say she wanted?

A. She said she wanted all of Honolulu.

Q. That is, she wanted the Honolulu property that your father held? A. Yes.

Q. What did your father say to that?

A. He said that she said that because she was influenced by her husband when she said she wanted that premises otherwise she would not have said it.

Q. Who was the next one that spoke?

A. My sister Marie.

Q. What did she say?

A. She said she loved my father, and for my father to give what he wanted.

Q. She did not make any request of your father?

(Testimony of Solomon K. Lalakea.)

A. No, because she had all she wanted that time.

Q. Who then spoke? A. Myself.

Q. What did you say?

A. I did not want anything myself, because for the reason that he has given me my education, and I think he has spent enough money for me, and if he wants to give me anything I leave it up to him.

Q. Now, was there anyone else present at that time that said anything?

A. Only the children, only a grandchild.

Q. What did the children say? This grandchild say.

A. Said all loved my father—said she loved my father and [239] mother and that she would remain with them until my father pass away.

Q. Now, Mr. Lalakea, after that day, in August after the disposition of the property was there anything else said by yourself or those present?

Mr. RUSSELL.—That is objected to, if the Court please.

The COURT.—Answer the question.

Mr. RUSSELL.—Note an exception.

The COURT.—Exception allowed.

A. He wanted to fix up what the children wants.

Q. Mr. Lalakea, I think you said a moment ago—you returned to Hilo in the later part of January, 1915? A. Yes.

Q. Mr. Lalakea, when you—at any time when you were in Honolulu in January of 1915, did Paul Mekanai send for you to come home to your father? A. Not that I remember of.

(Testimony of Solomon K. Lalakea.)

Q. If he had you would have remembered it?

A. Yes.

Q. Now, on the day when these were signed by your father you say the Namahoe came to the house at whose request?

A. My father requested me to go and get Mr. Namahoe.

Q. Did you go then to carry out your father's instructions? A. Yes.

Q. You went to the fish market? A. Yes.

Q. And did Namahoe come to the house at that time? A. He came afterwards.

Q. Now, looking at this map here, what is that opening?

A. An opening leading into the dining-room.

Q. Mr. Lalakea, I will show you Defendant's Exhibit marked 2 and this sketch shows the location of the rooms in the [240] where your father and you were at that time? A. Yes.

Q. From the porch you go into what room?

A. Leading on the other side into the living-room.

Q. Now, from the Puna side you go into what room? A. In the dining-room.

Q. And you go from here into what room?

A. Sleeping-room.

Q. On the Waiakea Hilo side what room is that?

A. My father's room.

Q. Just off the dining-room mauka this is the kitchen? A. Yes.

(Testimony of Solomon K. Lalakea.)

Q. The day that your father stated that he was going to sign these deeds he was in the dining-room?

A. Yes.

Q. Seated at a table? A. Yes.

Q. And that table is still in the same place in the dining-room? A. Yes.

Q. When you came after you returned from the fish market your father was in the dining-room?

A. Yes.

Q. Where were the deeds?

A. The deeds in the wardrobe.

Q. And by wardrobe you mean bureau?

A. Yes.

Q. Describe this piece of furniture.

A. This wardrobe kept my father where he kept his money.

Q. The wardrobe is indicated on this plan as an oblong figure? A. Yes.

Q. In the dining-room mauka side in the corner there is a [241] little— A. Little shelf.

Q. Do you know how many deeds there were?

A. About five of them.

Q. Now, when Namahoe came to your home what did your father say to him?

A. Told him to sit down.

Q. What did your father say then?

A. He told me what the purpose was, these deeds were separating all this estate, dividing the estate to the different children.

Q. Did he tell Namahoe what he wanted him for?

(Testimony of Solomon K. Lalakea.)

A. Yes, he told that he wanted him as a witness to sign the papers.

Q. And what did your father do then?

A. He started to *right* upon this, write his name.

Q. Now, these deeds which are in question, did he sign them first? A. All of them.

Q. Your father signed first? A. Yes.

Q. Who next? A. Namahoe.

Q. Who signed next? A. I signed.

Q. Mr. Lalakea when your father started to write was he able to make these marks on this deed? A. No.

Q. In what way did he do it?

A. He was shaky at this time.

Q. What did he say? [242]

A. He wanted me to come and hold his hand so he could write his name.

Q. What did you do?

A. I did as he requested me to do.

Q. Did you do that with one deed or all the deeds? A. All the deeds.

Q. After the deeds were signed and witnessed by you two what did you do with the deeds?

A. Pass over to me, told me—

Q. What did he tell you?

A. Told me to hold the deeds.

Q. What else did he say?

A. He said to hold the deeds until he pass away and then have them acknowledged.

Q. Have them acknowledged? A. Yes.

(Testimony of Solomon K. Lalakea.)

The COURT.—At the time he signed the deeds he gave you the instructions to hold the deeds have them acknowledged after he passed away.

A. Yes, sir.

Q. Mr. Lalakea, did your father say anything else? A. He did not say anything.

Q. In Defendant's Exhibit 1, who wrote "March 6th, 1915," who wrote that?

A. My handwriting.

Q. If Mr. Namahoe testified that the words "March 6, 1915," were inserted prior to the execution he was mistaken? A. March 6th?

Q. Yes.

Q. He was mistaken as to that? Mr. Namahoe testified that the handwriting in the document marked Defendant's Exhibit 1 as written in there "March 6th, 1915," that [243] was written in there prior to— A. Yes.

Q. What—that is a fact? A. Yes.

Q. And you testify that it was written in there when Mr. Namahoe arrived? A. Yes.

Q. Who wrote that? A. I did.

Q. You did then have some knowledge as to the reason Mr. Namahoe was coming there?

A. I do not know whether or not Mr. Namahoe know the purpose.

Q. Then you wrote March 6th, 1915.

A. Yes.

Q. On all of the deeds? A. All of the deeds.

Q. Did he tell you why he wanted the—

Q. No, he did not say anything at that time.

(Testimony of Solomon K. Lalakea.)

Q. And *you* explanation now is that you wrote the date and year on all of the various deeds?

A. Yes.

Q. And that is your only explanation?

A. Yes.

Q. Did you ask your father any questions at that time as to why?

A. No, I did not ask him any questions.

Mr. CARLSMITH.—Did you know at that time Mr. Lalakea who had drawn these deeds?

A. My father told me Mr. Shipman had drawn these deeds.

Q. That Mr. Shipman had drawn up these deeds?

A. Yes.

Q. When did he tell you that? [244]

A. Well, the—

Q. At the time the deeds were signed?

A. Before he had signed.

Q. Mr. Lalakea, did you know where your father had kept those deeds before the day when you wrote the “6th of March, 1915.”

A. In the wardrobe.

Q. Now, at the bottom of this wardrobe is a drawer? A. Yes.

Q. Now, when the documents were given to you was there anything said by him?

A. He did not say anything just told me to have it acknowledged.

Q. What was the word that was used by your father? A. “Hooiaio.”

Q. And you say the word means what?

(Testimony of Solomon K. Lalakea.)

A. Acknowledge.

Q. When your father gave these deeds to you what did you do with them?

A. I put them in a shoe box inside a little tin.

Q. What kind of a tin?

A. To put some papers in.

Q. You mean a document box? A. Yes.

Q. You put the deeds inside the document box, and then placed the tin box inside the shoe box?

A. Yes.

Q. And then after you had placed the deeds did you do anything else? A. Put it on the shelf.

Q. In what room? A. Dining-room.

Q. And after that you had possession of these deeds until your father died?

A. Was lying there in the dining-room. [245]

Q. Mr. Lalakea did you hear what the plaintiff Mrs. Makainai testified relative to your having the deeds? A. Yes, I heard.

Q. After your father's death these deeds were taken before the Circuit Judge and then acknowledged? A. Yes.

Q. And then what did you do with them?

A. I sent them to the registry.

Q. You sent to have them registered in Honolulu? A. Yes.

The COURT.—What day with reference to the death of your father did you have the deeds acknowledged before the Circuit Judge.

A. On the 8th.

(Testimony of Solomon K. Lalakea.)

Q. When did you send them to the Registry of Conveyances? A. On Monday.

Q. Week following? A. Yes, next week.

Q. That would be the 7th?

A. On the 10th that is what I think.

Q. Monday would be the tenth of May?

A. Yes.

Q. And when did you get the deeds back from Honolulu? A. I think a week or so, sometime.

Q. And these deeds from your father to Mrs. Makainai what did you do with it?

A. I gave to my sister Jenny Aiona.

Q. When? A. As soon as I received them.

Q. Why did you give these deeds to your sister she (?)

Jenny? A. Because (I) was the first named—

Q. As guardian of the deeds? A. Yes.

Q. Mr. Lalakea I will ask you to go back to the time, immediately prior or the same day, did you have some talk [246] with your father relative to these deeds? A. Yes.

Q. What did your father say to you?

Mr. RUSSELL.—That is objected to.

The COURT.—Answer the question.

Mr. RUSSELL.—Note an exception.

The COURT.—Exception allowed.

A. He said in Hawaiian—he said to carry out his instructions.

Mr. CARLSMITH.—Did you know at that time about what he referred to? A. Yes, I did.

Q. What instructions did he refer to?

(Testimony of Solomon K. Lalakea.)

A. About the deeds and having them acknowledged?

Q. About having them acknowledged?

A. Yes.

Q. Mr. Lalakea you have heard the evidence of Mr. O. T. Shipman, have you not?

A. Yes, I did.

Q. I will ask you what you did in going to O. T. Shipman's office that morning, about what time was it? A. Noon.

Q. About noon? A. Yes.

Q. He came to your place about one o'clock then? A. I think after one.

Q. What did you say to Mr. Shipman?

A. I told him to go over to the house.

Q. What else did you say to him?

A. Because he wants to have the papers acknowledged?

Q. What did he say to you?

A. He asked me how my father was.

Q. He asked you— [247]

A. He asked how the father was?

Q. What did you say then?

A. I told him that my father had fainted.

Q. That your father was unconscious?

The COURT.—Now, Mr. Shipman asked you whether or not your father was conscious or unconscious at that time? A. Was no —

Q. Did Mr. Shipman ask you whether or not your father was conscious?

(Testimony of Solomon K. Lalakea.)

A. He asked how my father was and I told him that—

Q. Did he use the word “conscious” or “unconscious”? A. No, he did not say that.

Q. You think, then, that he did not use the word “unconscious”? A. No.

Q. He just asked you how your father was?

A. And I told him that he was unconscious.

Q. Your father had fainted? A. Yes.

Mr. CARLSMITH.—Mr. Lalakea, after Mr. Shipman declined to come to the house what did you do?

A. When I told him that my father had failed, he told me that he could not do anything, if he was unconscious.

Q. What happened after that?

A. Finally, told me to go for the papers he wanted to see them.

Q. Did you go for the papers? A. Yes.

Q. What did you do?

A. I went right back for the papers.

Q. Mr. Lalakea, on what street is the tax office on? A. Keawe Street.

Q. Is that the same building?

A. No, it is a new building. [248]

Q. How many blocks is the tax office to your father's house? A. Two blocks.

Q. That is two blocks, two short blocks to your place? A. Yes.

(Testimony of Solomon K. Lalakea.)

Q. When you got home you say your father had passed away? A. Yes.

Q. When you went in where was he lying?

A. Back room.

The COURT.—He was dead at that time? Was he on the floor on a mattress?

A. He was on the bed.

Q. Yes? A. Yes.

Q. You say he was dressed at that time?

A. He was dressed with regular clothes.

Q. Coat on? A. No coat.

Q. Did he have on his outside pants? A. Yes.

Q. Have a shirt on? A. Yes.

Q. He had been dressed like that all morning?

A. Yes, sir.

Q. Now, you say he was in the back room?

A. Yes.

Q. No door from his room into the other room is there? A. Yes, small opening.

Q. From his room to the back room?

A. Now, when you arrived home who was there?

A. When I arrived my sister Hannah was there and she was crying.

Q. Who else was there?

A. My sister Mrs. Hewahewa. [249]

Mr. CARLSMITH.—Now during the morning do you know who had the key to the wardrobe?

A. No, I did not have the key.

Q. When did you get the key,—who did you get the key from?

(Testimony of Solomon K. Lalakea.)

A. I got it from my sister Mrs. Hewahewa.

Q. About what time? A. About after one.

Q. Your father was already dead?

A. My father was dead.

Q. During all of this time where were these deeds? A. On the shelf behind the door.

Q. The same place you had put them in March?

A. Yes.

Q. Mr. Lalakea, you heard the testimony of David Hewahewa did you not? A. Yes.

Q. What did you understand his evidence to be with reference to finding you in front of the Hilo Mercantile? A. I did not see him.

Q. Did you see him at all?

A. Yes, near Mr. Wise office.

Q. What time? A. After one.

Q. Do you remember meeting him down on Front Street that morning?

A. Well, I went on Front Street, went and looked for the doctor.

Q. You went to get the doctor?

A. When my father was unconscious at home.

Q. What doctor? A. I went to get Dr. Kimura.

Q. Did you walk or go in a hack?

A. I walked down Front Street and then I jump in a hack *and office*. [250]

Q. Where is the doctor's office?

A. Right near, opposite Hackfeld lumber-yard.

Q. On Front Street? A. Yes.

(Testimony of Solomon K. Lalakea.)

Q. Did you stand at all that morning near the Mercantile? A. No, I was not around there.

Q. Did you see Mr Hewahewa at any time during the course of your trip to the doctor's?

A. Never saw.

Q. Did you go first to Dr. Kitamura or go to the tax office first? A. I went to the doctor.

Q. Did you go to his house?

A. No, I went back to the house.

Q. You went direct to the *tan* office?

A. I went back to the doctor.

Q. You stopped in front of your house?

A. On the right outside.

Q. Doctor went inside? A. Doctor went inside.

Q. Then what did you do?

A. I went to Mr. Shipman.

Q. Did you discharge the hack?

A. I instructed the hack driver to wait until the doctor was ready, then take him back to the office again.

Q. Now, at the time you went to the tax office did you have any of these deeds?

A. No, I have not.

The COURT.—Isn't it a fact that you went from the tax office to your house to get the deeds in question? A. Yes.

Mr. CARLSMITH.—[251] Q. You found the deeds in the shoe box? A. Yes.

Q. What did you do with them?

(Testimony of Solomon K. Lalakea.)

A. I wrapped the deeds in a cloth, the kind used by my father.

Q. That is you used a napkin, or dining cloth?

A. Yes.

Q. When you went to Mr. Shipman's office the second time did you see anyone? A. Nobody.

Q. What did you do then?

A. I waited for him.

Q. Did you see Mr. Shipman again that day?

A. I waited and he did not come.

Q. What did you do with the deeds?

A. I came back to W. H. Smith's office.

Q. What was done with the deeds?

A. I gave them to Judge Wise,

Q. Then what did you do, what did *did* you and Judge Wise go to see Judge Parsons?

A. I think next day following.

Cross-examination by Mr. RUSSELL.

Q. Now, you say that when you came back you took charge of your father's affairs? A. Yes.

Q. You looked after the collection of rents?

A. Yes.

Q. You made mortgages? A. Yes.

Q. And deeds? A. Yes. [252]

Q. You say that you had—you had control of all the work of your father? A. Yes.

Q. That is in connection with transfers, mortgages and leases you used your own judgment, or did you go to your father for instructions?

(Testimony of Solomon K. Lalakea.)

A. Well, I did not do anything about leases. I would do just what he say.

Q. With regard to mortgages you would go to your father for instructions.

A. I talk to him about the matter and if the transaction is good, all right.

Q. You then after the instruments were executed and delivered you used to see that they were sent down and were recorded? A. Yes.

Q. And you know that your father was in the habit of having documents recorded right away after they were executed? A. Yes.

Q. Right after they were acknowledged?

A. Yes.

Q. And you know also that he would have deeds recorded right away?

A. Sometimes he would have them acknowledged right away and sometimes did not have them until three years and then he would have them recorded.

Q. They were acknowledged at the time they were executed? A. Yes.

Q. Now, where did you say you placed these deeds? A. Placed in the wardrobe.

Q. Who kept the key? A. My father.

Q. And you father was the only one that had a key to this [253] wardrobe? A. Yes, he did.

Q. But you could get the key if you wanted to get into the wardrobe? A. Yes.

Q. So that you had the key at the time when there was occasion for you to go to the wardrobe to get out things?

(Testimony of Solomon K. Lalakea.)

A. When I want anything in the wardrobe I would get the key.

Q. Your father would give you the key?

A. Yes.

Q. Now, after you came back you looked after his affairs as also you made leases, and you consulted with your father, or did you just do what you thought best? A. No, I did not.

Q. You did not do any consulting? A. Yes.

Q. You would get his advice? A. Yes.

Q. What particular point would you have to consult your father about?

A. Sometimes I would get different points, which would be best business, and see if it is all right.

Q. That is you would get his approval?

A. Yes.

Q. There would be a judiciary relation between you and him? A. I think, that is—

Q. He would leave everything to you?

A. Yes.

Q. Your statement is that there were five deed on that table? A. About five.

Q. What were these deeds? [254]

A. There was one to my sister Marie, one for my brother George.

Q. When did your sister Marie die?

A. April.

Q. April, 1915? A. Yes.

Q. Were these deeds recorded after your father's death? A. Yes.

(Testimony of Solomon K. Lalakea.)

Q. You say that your father asked you to hold his hand while he signed the deeds? A. Yes.

Q. He asked you to assist him in signing?

A. Yes.

Q. How was he after that?

A. He was well—was sick off and on.

Q. Was your father able to walk?

A. Not able to walk, had to hold on to someone.

Q. Now then did he appear any weaker then, than what he was a week before that?

A. He was beginning to get weak the last week in March.

Q. On the 6th day of March he was weak?

A. Yes, he was.

Q. Then he was a little weaker from then on?

A. Yes.

Q. And then he would get better?

A. He would get better.

Q. You remember the lease to the Japanese of this property? A. I drew up that lease.

Q. What was the condition of your father that day, the day when this was executed?

A. He was feeling much better. [255]

Q. He signed the lease without any assistance?

A. No, did not need any assistance, that day he was feeling all right.

Q. Upon the day, on the 20th of March did you discuss the matter of that lease with your father?

A. Yes.

Q. You did? A. Yes.

Q. Was there anything said, any reference to

(Testimony of Solomon K. Lalakea.)

that lease being made of the premises, described in the deed in Exhibit 1 anything said?

Q. Did not say anything about that deed.

Q. Did you say anything to your father or your father to you about that land described in the lease being a part of the land described in the deed to you?

A. No, did not say anything of the kind.

Q. Isn't it a fact that it is the same land described in the deed to you? A. Yes.

The COURT.—Did O. T. Shipman take the acknowledgment of the leases?

A. I think he did.

Q. Why did you want to have the acknowledgment to the deeds on the day he died?

A. He told me not to forget.

Q. You went to O. T. Shipman's office at the time your father died to get him to take the acknowledgments; is that right? A. Yes.

Q. You delayed more than two months to get Shipman's acknowledgment.

A. I did not delay it was upon instructions that I followed.

Q. Well, the papers had been signed the 6th of March? [256]

A. Yes.

Q. Now, why did you delay a matter of such importance as this?

A. Well, I did what I was instructed to do.

Q. Why did you want Shipman to come and take the acknowledgments of the documents?

(Testimony of Solomon K. Lalakea.)

A. Because—

Q. Why did you want Ollie Shipman to take the acknowledgments if your father was unconscious?

A. Because he drew up the papers.

Mr. RUSSELL.—Q. Now—

The COURT.—Did you know on the day that your father signed these deeds on the 6th of March, 1915, that after his death that you could go to the court before a Judge and have it acknowledged?

A. After that.

Q. Did you know this on the 6th of March, 1915?

A. No, I did not know.

Q. When was the first time you found out?

A. I went to Judge Wise and he gave me instructions what to do so I did.

Q. Otherwise these deeds would be useless?

A. I did not know anything about that.

Q. The deeds in question did you think that these were good or did you think they were valid?

A. I did not know anything about that.

Q. What?

A. I did not know whether valid or not, I thought it is all right, that it was all right.

Q. You sent to Mr. Shipman to come to your house at the time your father died? A. Yes, I did.

[257]

Q. Didn't you state when you rushed over to the tax office state that you were in plenty of pilikia, and that you requested him to come over and take your father's acknowledgment of the deeds, and upon that Mr. Shipman asked you whether or

(Testimony of Solomon K. Lalakea.)

not your father was conscious or unconscious, you remember that? A. Yes.

Q. Is that a fact? A. Yes.

Q. Isn't that a fact you stated that you were in plenty of pilikia?

A. I don't remember, but I asked him to take the acknowledgments?

Q. To acknowledge these deeds? A. Yes.

Q. Do you know that it is void to take the acknowledgment of an unconscious person?

A. I did not know about that.

Q. You thought that the acknowledgment by persons who had signed before was all right?

A. Well, I know that if he sign it was all right.

Q. Your father was unconscious?

A. When he pass away.

Q. He had not passed away yet at that time?

A. Was unconscious.

Q. He did not; he had not passed away at the time you went to Mr. Shipman's office? A. No.

Q. Why—was there any reason for this great rush at the time you had these deeds acknowledged.

A. I don't know.

Mr. RUSSELL.—Do you admit your father, you say that you took hold [258] of your father's hand—just show us in what way you did that?

A. This is the way I held his hand, this way.

Q. Indicating that you held your fingers over his fingers. A. Yes.

Q. Now, were you in the house all that day with the exception of the time you went for the doctor?

(Testimony of Solomon K. Lalakea.)

A. Yes, I remember I was home all the time.

Q. You were. A. Yes.

Q. About what time, to the best of your recollection, what time was it that these instruments were signed—about two o'clock; is that right?

A. Between eleven and twelve.

Q. You were there all of the time? A. Yes.

Q. You told nobody about these, about this mortgage? A. Yes.

Q. You were with your father all of the time?

A. I was all of the time.

Q. You could have seen anybody that came there to the house? A. Yes.

Q. You did not see anyone coming to the house?

A. No.

Q. You recollect Mr. Shipman testifying?

A. I remember his testimony.

Q. That he wanted to collect some money that your father owed? A. Yes.

Q. You recall the testimony of Mr. Shipman?

A. I heard his testimony. [259]

Q. Did you after this relative to the time your father died tell Mr. Namahoe anything about these deeds that had been executed?

A. No, I did not say anything.

Q. Did you say anything to Mrs. Hewahewa about these deeds having been executed? A. No.

Q. Did you say anything to your brother?

A. Nothing at all.

The COURT.—Why did you not tell Mr. Hewa-

(Testimony of Solomon K. Lalakea.)

hewa about these deeds in question, or did you ever mention it? A. I talked.

Q. When? A. After my father die.

Q. How long after the death?

A. I know not very long, about two weeks.

Q. You know then that this deed conveyed all the land to you? A. Yes.

Q. As a matter of course you knew that the great portion of the estate was delivered over to you, on March 6th? A. Yes.

Q. You knew that—what did you tell your sisters at the time the deed was signed by yourself and witness Namahoe? A. They was not around there.

Q. No one? A. Only us.

Q. Who? A. Mr. Namahoe and myself.

Q. Nobody else present?

A. Anyone in the house or not I do not know.

Q. When you went to look for the doctor there was some one left with your father, he was not left alone? [260] A. No.

Q. As a matter of fact there was someone present all the time, some member of the family?

A. Nobody else was there; he only requested us.

Q. You knew that this matter was of great importance to everybody? A. Yes.

Mr. RUSSELL.—Mr. Namahoe said he was there about half an hour; is that correct?

A. More or less.

Q. You all sat around the table that day; is that right? A. Yes.

Q. Do you recall whether or not at any time

(Testimony of Solomon K. Lalakea.)

when you and your father and Mr. Namahoe were seated at this time, at this table, Mr. Hewahewa came in? A. No.

Q. You do not remember? A. No.

Q. Well, now, Mrs. Hewahewa lived there?

A. Yes.

Q. Do you remember, you now remember that at the time there was no one else in the house but you two? A. No.

Q. And there was no one home because of some prearranged plans? A. No.

Q. It just happened that all the members of the house were out at that time? A. Yes.

Q. I understand you to say that the reason you did not tell her about that was because you considered that these deeds were of no benefit until the death of your father, is that right? [261]

A. Yes.

Q. You made reference to what your father told you to wait until he passed away before having them acknowledged? A. Yes.

Q. Did you have them acknowledged?

A. No.

Q. He used what word?

Q. "Hooioio," which you understood to be acknowledged? A. Yes.

Q. Now, on the day of your father's death you say that you did not see Mr. Hewahewa down on Front Street? A. No.

Q. You did not meet Mr. Hewahewa—

A. The only place that I saw Mr. Hewahews was

(Testimony of Solomon K. Lalakea.)

in front of Judge Wise's office only place, not Front Street.

Q. You think, then, that Mr. Hewahewa is mistaken in his statement?

A. I do not think it; it is a lie.

Q. It is a fact that when he did meet you in front of Mr. Wise's office he had been looking for you? A. He did not look for me.

Q. Did not look for you? A. No.

Q. He told you that your father had died?

A. No, I heard already.

The COURT.—You were at home at the time Hewahews arrived at the house? A. Yes.

Q. Now, when you went to Judge Wise's office after you had gone to see Mr. Shipman in March, 1915, to have the deeds in question acknowledged, did you tell the other members the other brother and sisters about having the deeds acknowledged? [262] A. No, I did not.

Q. Did you tell Mr. Shipman?

A. Did not say anything.

Q. You lost no time for these deeds to be acknowledged after the death of your father, in carrying out his request? A. Yes.

Mr. RUSSELL.—As a matter of fact, you did not say anything to Mrs. Makainai about the deeds until 1917? A. Nothing.

Q. That is, you did not say anything to Mrs. Makai about these deeds being acknowledged until

(Testimony of Solomon K. Lalakea.)

1917 when you procured a certified copy of the deed? A. It was some time about that.

Q. 1917? A. I think in 1915.

Q. And you procured a certified copy for Mr. Wise? A. Yes.

Q. Do you remember when you said to Mr. Shipman—Mr. Shipman told you to go back to the house and get the papers,—did you know just what he proposed to do with them? A. No, I did not.

Q. He did not say? A. He did not say.

Q. He did tell you at that time that all papers that were—he did tell you at that time, that it was useless? A. Yes.

Q. Did he lead you to believe that he was going to acknowledge these? A. I did not know.

Q. You believed that a deed could be acknowledged altho the party was unconscious? A. Yes.

[263]

The COURT.—Why did you go back to the house?

A. To get the deeds and take them to Shipman's office.

Q. After that what did you do?

A. Went to the office but he was not in.

Q. What did you do next?

A. We came to Judge Wise's office. I came to the office of Judge Wise.

Q. Did you go to look for Mr. Shipman?

A. I waited for him and he did not come.

Q. You knew that Judge Wise could acknowledge these? A. I knew.

Q. You knew that Mr. Shipman could not take

(Testimony of Solomon K. Lalakea.)

the acknowledgments when your father was lying at home unconscious? A. Yes.

Q. Did Judge Wise inform you that this deed could be acknowledged, if upon a proper showing?

A. Yes.

Mr. RUSSELL.—You knew that Judge Wise could not take the acknowledgments, but if a proper showing were made, it could be done—did Judge Wise explain it to you?

A. I did not believe that, what I believe.

Q. You—

Q. It could be acknowledged.

Q. You believed, that even *thou* your father was dead this could be acknowledged? A. Yes.

Q. You knew that an instrument had to be signed by an official, notary—you knew that an instrument has to be certified to by an official notary public?

A. Yes.

Q. You knew that? A. Yes.

The COURT.—You knew what these deeds contained? [264] A. Yes.

Q. You say you went to get the doctor? A. Yes.

Q. You also say that you went to see Mr. Shipman, because you had received this instruction from your father? A. Yes.

Q. Why did you go to Mr. Shipman and ask him to acknowledge these when you knew that he was going to die—your father was going to die? .

A. I did not know.

Q. You knew, however, that a notary public could

(Testimony of Solomon K. Lalakea.)

not take an acknowledgment of a person that was dead—you knew that? A. I did not know that.

Q. You sure you do not know, you know that a notary public could not take the acknowledgment of a person that was already dead?

A. I don't know anything about that.

Q. Didn't you know that a notary public that had taken the acknowledgment must be present when the instrument is being executed? A. Yes.

Q. Well, you do know then? These deeds have been signed? A. Yes.

Q. But the man was dead? A. Yes.

Mr. RUSSELL.—Why was it, then, when you say that you were taken in to your father's confidence about the business matters and affairs, why didn't you ask your father about that deed?

A. I did not ask him.

Q. Any reason why you did not ask him?

A. No, because I— [265]

Q. What was there secret about it?

A. We did not have any talk about it.

Q. Now, you were quite familiar with your father's affairs. A. Yes.

Q. And you keep account in a book? A. Yes.

Q. Now, your father had a check account?

A. Yes.

Q. Did you use to make out the checks and he would sign them? A. Sometimes.

The COURT.—You took up business law in school? A. Yes.

(Testimony of Solomon K. Lalakea.)

Q. How far did you go? A. Junior.

Q. What course did you take?

A. Commercial course.

Q. Business course? A. Business course.

Q. Business law?

A. It was not a special study, it was in the course, we had to take it.

Q. This was at Punahou? A. Yes.

Q. You did not take that up as a special study?

A. No.

Q. You were a good student, were you not?

A. Yes, I was a good student. I was industrious in my studies.

Q. In fact, the best student in the school?

A. I don't know about that.

Q. As a matter of fact, you were considered to be the best student in the school?

A. I used to study hard. [266]

Q. Well, you were the highest student in the school?

A. Ask Tom Pedro, he knows; he was in school the same time.

Mr. RUSSELL.—Q. With reference to your statement that Mr. Hewahews did not talk to you at the time he met you going into Judge Wise's office, you don't suppose that he knew that you had gone to Shipman's office?

Mr. CARLSMITH.—That is objected to, if the *Court upon* the ground that it is irrelevant and immaterial.

Mr. RUSSELL.—I withdraw the question.

(Testimony of Solomon K. Lalakea.)

Q. Did your father appear any stronger on March 20th than he did on March 6th?

A. Yes.

Q. That is by his talk you could tell he was much stronger?

A. No, he was good then, he was better then.

Q. He was better on March 20th? A. Yes.

Q. He was able to talk? A. Yes.

The COURT.—Mr. Lalakea, all of the various sisters of the family that were residing with your father after your return from Honolulu up to the time of his death, that is did they exist that friendly relationship up to the death of your father? A. Yes.

Q. No hard feelings at all? A. No.

Q. You have stated that after your mother's death you all got together to talk about the distribution of the property after your father's death?

A. Yes.

Q. And each told your father what they wanted except Mrs. Hewahewa? A. Yes. [267]

Q. And she said she had a reason for not telling what she wanted then and there in front or in the presence of everyone? A. Yes.

Q. You were the only one in the family that had a good education? A. Yes.

Q. Now, at this time when your father called all the children together, he wanted to see that all the children were satisfied? A. Yes.

Q. He wanted all the children satisfied?

A. Yes.

(Testimony of Solomon K. Lalakea.)

Q. He wanted the idea of all the children?

A. Yes.

Q. Can you give any reason, Mr. Lalakea, why your father on the 6th of March should be so shrewd in disposing all of the property to you, when he had already asked the idea of all the other children—can you give any reason?

A. Give no reason.

Q. Did he mention to the other members of the family that he had transferred all of the property to you? A. He did not.

Q. You did not mention it to the family?

A. No.

Q. Didn't you feel that at the time the deeds were executed, Mr. Lalakea, that your father had left no disposition for the family?

A. There was no discussion that day.

Q. Was there any reason why he should give you all the property? A. No. [268]

Q. There was no trouble between the family?

A. No.

Q. None whatsoever? A. No.

Q. Matter of fact he loved his children?

A. Yes.

Mr. RUSSELL.—At this time, if the Court please, I would like to adjourn, with the idea of calling upon the stand Mr. O. T. Shipman, who is now in Kona and expected back to-morrow noon.

The COURT.—At this time the Court will stand *adjourn* until to-morrow morning at ten o'clock
A. M.

Tuesday, June 29th, 1920.

Mr. RUSSELL.—It was my intention to call Mr. O. T. Shipman this morning, in rebuttal, but I was informed that Mr. Shipman who has been in Kona had just left Kona this morning and would not be in Hilo until noon. I also further state that I have examined the transcript and found that what I had intended asking Mr. Shipman was already admitted in evidence, in the early stage of the case and for that reason the defendant now rests.

Mr. Russell argues before the Court.

The COURT.—Desire a brief to be filed. Allowing the attorneys ample time. [269]

Wednesday, September 1st, 1920, *Lo* o'clock A. M.

Present in Court:

Mr. CARLSMITH, of the firm of CARLSMITH & ROLPH, Appearing as Attorney for the Administrator.

Mr. PATTERSON, of the firm of RUSSELL & PATTERSON, Appearing as Attorney for Mrs. Makainai and Mrs. Hewahewa.

Mr. SOLOMON K. LALAKEA, present in court.

The COURT.—The Court on its own motion will reopen the case of, Law 671, Hannah Makainai vs. Solomon K. Lalakea, for the purpose of taking such evidence as it feels necessary, covering some questions of fact, which the Court is now in doubt. Mr. Shipman please take the stand.

(Testimony of — Shipman.)

Mr. CARLSMITH.—On behalf of our client, Mr. Lalakea, we desire to object to the Court reopening the above-mentioned case.

The COURT.—Objection overruled.

Mr. CARLSMITH.—To which ruling we desire to save an exception.

The COURT.—Exception allowed.

Testimony of — Shipman, for Defendant.

Mr. SHIPMAN, being examined by the Court.

Q. Mr. Shipman, your testimony on page 13 in that part of the transcript known as the defendant's transcript or the defendant's case, a witness by the name of Dan Namahoe while being examined testified that Solomon came for him at about eleven o'clock, between eleven and twelve o'clock of March 6th, 1915, and on page 19 of the same part of the transcript in answer to the following question: Q. About how long were you there at that time? Ans. I think about half an hour, probably a little more. Q. About what time of the day was this? Ans. Before noon, this being on March 6th, 1915,—and, Mr. Shipman, you have also testified that on March 6th, 1915, you [270] visited the home of Thomas K. Lalakea, do you remember that testimony? A. Yes, I do.

Q. Is that a fact, did you visit—

Mr. CARLSMITH.—I desire to object to the question propounded to this witness, upon the ground that it calls for a conclusion of this wit-

(Testimony of — Shipman.)

ness, and upon the further ground that it is immaterial at the present time.

The COURT.—Objection overruled.

Mr. CARLSMITH.—We save an exception.

The COURT.—Exception allowed.

Q. Did you visit the home of Thomas K. Lalakea? A. Yes, sir.

Q. You saw Thomas K. Lalakea on March 6th of 1915? A. I did.

Q. What time of the day was that, if you remember?

A. About four o'clock or a little before or afterwards.

Q. And have you the same reason in mind now, as you had on the day you testified before?

Mr. CARLSMITH.—That is objected upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question.

Mr. CARLSMITH.—We save an exception.

The COURT.—Exception allowed.

A. Yes, it was a little after four, because on that day I was leaving for Honolulu on the "Matsonia," which was leaving at five o'clock, and as I needed some money went to see Lalakea, to collect for services that I had rendered, and another fact I remember is, that it was the first time that I had been at a meeting of the Board of Equalization in Honolulu which was to meet on Monday morning the 8th. [271]

(Testimony of — Shipman.)

Q. Did you have a talk with Thomas K. Lalakea at that time? A. I did.

Q. You have testified that you have known Thomas K. Lalakea since 1905? A. Yes, sir.

Q. Now, you talked with Thomas K. Lalakea on March 6th, of 1915, when you went to his house to collect this money at or about four o'clock P. M.

Mr. CARLSMITH.—That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question.

Mr. CARLSMITH.—We save an exception.

The COURT.—Exception allowed.

A. I talked with the old man for about fifteen minutes, it could not have been more than that.

Q. Was he able to walk, did he walk?

A. Oh, yes; oh, yes; oh, yes.

Q. Did he give any evidence of being feeble?

Mr. CARLSMITH.—That is objected to upon the ground that it is immaterial, incompetent and irrelevant.

The COURT.—Answer the question.

Mr. CARLSMITH.—We save an exception.

The COURT.—Exception allowed.

A. He was in his normal condition; he was able to do business, and did do business that morning; he did complaint that his feet were swollen, but whether it was dropsy or not I am not able to state but outside of that he was normal, able to do business and did do business.

(Testimony of — Shipman.)

Q. Did you notice the condition of his hands as to whether or not they were shaky or not?

Mr. CARLSMITH.—Objected to upon the ground that it is leading and upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question. [272]

Mr. CARLSMITH.—We save an exception.

The COURT.—Exception allowed.

A. His hands were in the same condition at that time as they were before.

Q. Do I understand you to mean that his hands were no more shaky on this 6th of March, 1915, than they were at a time prior to that, at that time he acknowledged other documents?

Mr. CARLSMITH.—That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question.

Mr. CARLSMITH.—We save an exception.

The COURT.—Exception allowed.

A. No more shakier than what his condition had been.

Q. You need not answer this question until Mr. Carlsmith has made his objection I will ask you whether or not in your opinion on March 6th, 1915, Thomas K. Lalakea was in a condition where he was unable, where it was impossible for him to attach his signature to an instrument or to four or five instruments?

Mr. CARLSMITH.—Objected to upon the ground that it is leading, that it calls for a conclu-

(Testimony of — Shipman.)

sion of this witness, that it is incompetent, irrelevant and immaterial and that this witness is not qualified to pass upon such as he is upon a question that has just been interrogated.

The COURT.—What have you to say, Mr. Patterson?

Mr. PATTERSON.—Mr. Shipman is qualified to answer this question as far as I know. I have only come into this case, not having been in it at the early stage, but I should say that he is qualified to answer.

The COURT.—Objection sustained. [273]

Q. Mr. Shipman, calling your attention to Law #671, an Equity case, and in that case a lease marked Plaintiff's Exhibit "C" on July 26th, 1920, signed Thomas Pedro, Jr., Clerk, calling your attention to particularly to the acknowledgment on the lease in question the date of the acknowledgment being March 20th, 1915, that would be fourteen days after March 6th, 1915, whose signature would you say was attached to the document that lease?

A: Mr. Thomas K. Lalakea's signature.

Q. Do you recall when he wrote it?

A. I was present when he wrote it.

Q. What was Mr. Thomas Lalakea's physical condition, if you know, from that, from your observation on March 20th, 1915, the date of the acknowledgment to this lease Plaintiff's Exhibit "C" as comparing his physical condition on March 6th,

(Testimony of — Shipman.)

1915, fourteen days subsequent, fourteen days prior to that time?

Mr. CARLSMITH.—That is objected to upon the ground that it is incompetent, irrelevant and immaterial, and calls for the conclusion of this witness.

The COURT.—Answer the question.

Mr. CARLSMITH.—To which we save an exception.

The COURT.—Exception allowed.

A. He appeared to be in the same condition on both occasions.

Q. On March 20th, 1915, when he attached his signature, wrote Mr. Thomas K. Lalakea, his name to Plaintiff's Exhibit "C," did he have to have any assistance? A. No.

Q. Did he make any complaint as needing assistance?

Mr. CARLSMITH.—That is objected to upon the ground that it is [274] incompetent, irrelevant and immaterial.

Q. Was any assistance given him?

A. He signed himself personally, and without the assistance of anyone.

Q. You have testified Mr. Shipman on your prior examination that you were familiar with the signature of Thomas K. Lalakea? A. Yes, sir.

Q. Now, calling your attention to an exhibit in Law #671, Hannah Makainai vs. Solomon K. Lalakea, received in evidence June 23d, 1920, and marked Plaintiff's Exhibit 1, signed Thomas Pe-

(Testimony of — Shipman.)

dro, Jr., Clerk, and calling your attention to pages 150, 151, being under date of March, 1915, page 152 being as of April, 1915, and dates thereafter and particularly calling your attention to the date of March 10th, and all dates on page 150 and pages 151, 152 and 153, now can you give us the handwriting of Thomas K. Lalakea?

Mr. CARLSMITH.—That is objected to upon the ground that it is incompetent, irrelevant and immaterial.

The COURT.—Answer the question.

Mr. CARLSMITH.—To which we save an exception.

A. Yes, I can.

Q. Give the dates.

A. March 3d, March 1st, Z. Kosuno, is in the handwriting of Thomas K. Lalakea; Takei Watada, under the same date, is in the handwriting of Thomas K. Lalakea; Mrs. Kapahio, also under the same date, is in the handwriting of Thomas K. Lalakea; these three under date of the 1st of March, are in the handwriting of Thomas K. Lalakea; J. K. Kekaula, under date of the 3d, is NOT the handwriting [275] of Thomas K. Lalakea; Hop Kee, under date of the 3d, is in the handwriting of Thomas K. Lalakea; W. A. Todd, under date of the 3d, is in the handwriting of Thomas K. Lalakea.

Q. Next entry.

A. Siochika, under date of the 10th, is in the handwriting of Thomas K. Lalakea; the same date

(Testimony of — Shipman.)

March 10th, Kawasami, is in the handwriting of Thomas K. Lalakea; J. K. Kekaula, under date of the 11th, is in the handwriting of Thomas K. Lalakea; same date, Salamado, is in the handwriting of Thomas K. Lalakea; under date of the 13th, Minawai Sai, is in the handwriting of Thomas K. Lalakea, and under date of the 13th of March, to Geo. Hussey, is in the handwriting of Thomas K. Lalakea.

Q. Now, page 151.

A. C. H. Brickwood, under date of the 13th, is in the handwriting of Thomas K. Lalakea; Kawamua Magaocheri, under date of the 19th, that is not in the handwriting of Thomas K. Lalakea; same date, D. Keawehano, is in the handwriting of Thomas K. Lalakea; same date, Murawaka Emos, is written in the handwriting of Thomas K. Lalakea; under the same date, Hamader Kumatiro, that is in the handwriting of Thomas K. Lalakea; on the 24th, Mrs. W. W. Todd, that is in the handwriting of Thomas K. Lalakea; under date of the 27th, Mrs. Kaaha, that is in the handwriting of Thomas K. Lalakea; Henry Kalahiki April 9th, that is not in the handwriting of Thomas Lalakea; Geo. Tucker, under date of April 10th, not in the handwriting of Thomas K. Lalakea; under date of the 12th of April, Sskamoto, that is not in the handwriting [276] of Thomas K. Lalakea; John Masuhashi, 5th, that is not in the handwriting of Thomas K. Lalakea; Keala Hanohano, the 5th, that is in Thomas K. Lalakea's own handwriting.

(Testimony of — Shipman.)

Q. On page 152, referring to those entries?

A. None of these are in the handwriting of Thomas K. Lalakea.

Q. How about page 153? A. The same.

Q. Any further questions.

Mr. CARLSMITH.—None.

Mr. PATTERSON.—Any cross-examination?
(By the Court.)

Mr. PATTERSON.—None, your Honor.

The COURT.—In Law 671, the pages referred to, that is 150, 151, 152, 153, may be received in evidence and marked accordingly.

Mr. CARLSMITH.—The offer of the Court is objected to upon the ground that no person engaged in this trial, having made this offer, and upon the further ground that the offer is incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. CARLSMITH.—We note an exception.

The COURT.—Exception allowed. [277]

Territory of Hawaii,

County of Hawaii,—ss.

I hereby certify that the above is a true, and complete, transcript of my notes of the evidence, rulings and motions, in the above-entitled cause.

RUTH A. QUINN,

Official Court Reporter, 4th Judicial Circuit, Territory of Hawaii.

Sept. 1st, 1920.

[Indorsed]: L. No. 671. Doc. 3, pg. 92, 214. Hannah Makainai vs. Solomon K. Lalakea. Transcript of Evidence. Filed at 11 o'clock A. M., August 13, 1921. T. J. Ryan, Clerk. No. 1345. Rec'd and filed in the Supreme Court, August 16, 1921, at 10:20 A. M. J. A. Thompson, Clerk. [278]

[Title of Court and Cause.]

Opinion.

ERROR TO CIRCUIT COURT, FOURTH CIRCUIT.

Hon. C. K. QUINN, Judge.

Argued October 19, 1922.

Decided November 10, 1922.

PETERS, C. J., LINDSAY, J., and Circuit Judge O'BRIEN in Place of PERRY, J., Disqualified.

Appeal and Error—Review—Findings of Court Jury Waived.

A holding by this Court upon an interlocutory bill of exceptions to review the denial by the Trial Court (jury waived) of a motion by defendant for nonsuit, that plaintiff upon certain issues of fact had made out a *prima facie* case, is equivalent to a holding that there is sufficient evidence to sustain ultimate findings by the Trial Court in favor of plaintiff upon the same issues.

Trial—Continuance.

No abuse of discretion appearing, held: That a motion for a continuance was properly denied.

[279]

OPINION OF THE COURT BY PETERS, C. J.

Defendant in error, plaintiff below, brought ejectment for possession of certain lands on the Island of Hawaii claiming an undivided interest therein as one of the children and heirs at law of the late T. K. Lalakea. The defendant, a son of the decedent, claimed the lands in entirety under a deed from his father to him dated March 6, 1915, alleged to have been executed by the deceased and delivered to his son about two months prior to the former's death. The case was here once before upon an interlocutory bill of exceptions whereby was presented for review the refusal of the Trial Court (trial was had jury waived) to grant defendant's motion for a nonsuit. This Court held that the motion had been properly denied. (See 25 Haw. 470.)

After remand further trial was had resulting in a judgment in favor of the plaintiff. The Court in no uncertain language found that the signature of T. K. Lalakea, as subscribed to the deed, was a forgery and had never been executed by him, and even assuming the same to be genuine delivery of the deed had never been made by the grantor to the grantee. Errors are assigned to these findings.

Upon the interlocutory bill of exceptions to the denial of defendant's motion for a nonsuit this Court held that the plaintiff had made out a

prima facie case in support of her claim and that the signature of her father to the deed under which the defendant claimed was a forgery and the deed was never executed by her father, and even if the signature were genuine no delivery of said deed had been made by the grantor to the grantee. This being so there was obviously sufficient evidence to sustain the ultimate findings of the trial court upon the same issue.

Plaintiff in error also assigns as error the refusal of the trial court to grant him a continuance for a week to permit [280] one of his attorneys, Carl S. Carlsmith, Esq., lately employed by him, to prepare the case for further trial. It appears from the record that the defendant below was originally represented by Messrs. W. S. Wise and W. H. Smith of the Hilo bar; that these gentlemen conducted the case for the defendant in the trial court up to the motion for a nonsuit and in this court upon interlocutory exceptions thereto; that on June 17, 1920, the cause having been duly and regularly called for further disposition, Mr. Wise orally requested a continuance until the return of his associate, Mr. W. H. Smith, who was then absent from Hilo on the mainland of the United States, but if this request did not meet with the Court's approval that the case be not set for trial earlier than the following week; that counsel's request for such continuance was refused and the case was set for further trial upon the following day at 10 A. M., that same afternoon (June 17, 1920), after the case had been thus set for trial,

Messrs. Carlsmith & Rolph, also attorneys of Hilo, entered their general appearance as attorneys for defendant, their firm, as appears from the affidavit of Mr. Carlsmith hereinafter referred to, having been retained on that day; that the case did not proceed to hearing on June 18, 1920 (for what reason we are not informed), and on June 24 was reset for trial for June 28 following; that on June 28 and at the time set for trial defendant presented a motion for a continuance for a week supported by the affidavit of his attorney Mr. Carlsmith. This affidavit is in substance as follows: That the firm of Carlsmith & Rolph, of which affiant was a member, was retained by the defendant at noon on June 17, 1920, to represent him in the instant case (hereinafter in connection with said affidavit referred to as the Makainai case) and two other matters pending in the Fourth Circuit Court, to wit, the Estate of T. K. Lalakea, Deceased, of which Solomon Lalakea was administrator, and an action [281] by Solomon Lalakea, as such administrator, against one Todd upon a promissory note to which, in addition to the defenses permitted under a general denial notice had been given of the defense of want of consideration, fraud and misrepresentation; that court proceedings in all said matters are imminent; in the matter of the Estate of T. K. Lalakea an order had been served on the administrator to show cause why he should not file his final accounts and apply for his discharge and the master, to whom had been referred the accounts in said estate covering the past four

years, had requested the administrator to present evidence to sustain certain of said accounts; the Todd case and the Makainai case had been mentioned by the Court as likely to be set for an early date—in fact, on the afternoon of June 17 affiant had been advised by the Court to prepare for an early trial in both cases; that the estate matter before the master involved surcharges of \$6,000 to \$10,000, which the master upon the then state of the case was inclined to recommend; that the principal of the claim in the Todd case was \$1,621.65 and the value of the property involved in the Makainai case was \$400,000; that in connection with the estate matter and the Todd case affiant performed the following services: On June 17, he drew and filed a return to show cause in the estate matter and in the afternoon presented the same to the Court consuming most of the afternoon and resulting in a continuance to an indefinite date and until the disposition of the Todd case; June 18 and late into the night of the same day and all of June 19, he devoted to the accounts of the administrator before the master, making a careful examination of the accounts and consulting with and examining the administrator and his attorneys; he also spent an entire day prior to the trial of the Todd case in appearing before the master upon the accounts, submitting evidence in support thereof; on June 18 and 19, he devoted such time as his [282] other engagements permitted, and on June 20, and on the evening of that day and on June 21, and on June 22, before court hours de-

voted his time exclusively to the preparation for the trial of the Todd case, the trial of which began in the morning of June 22, and continued until noon of June 24; that Mr. Rolph, the other member of the firm, was otherwise exclusively engaged and was not available for any assistance; that W. H. Smith, one of Lalakea's attorneys, was absent on the mainland; that Mr. Smith at the time of his departure, by reason of the previous illness of the Judge of the Fourth Circuit Court and the statute prohibiting trials of all term cases during July and August, was under the impression that the trial of the Makainai case would not come up until September following; that it was now impossible to secure Mr. Smith's presence or communicate with him; that W. S. Wise, the other attorney for Lalakea in the Makainai case, would be of no considerable assistance to affiant because he was a man advanced in years, in poor health, deaf and had made no preparation for the trial; that affiant had no previous knowledge of the facts or the law involved in the Makainai case and had been confined in his investigation thereof to the records and memoranda of Mr. Smith and to the facts obtainable from his client and his associate, Mr. Wise; that due to the preparation necessary in the estate matter and the accounts of the administrator before the master, the preparation for trial in the Todd case and his court engagements in connection therewith and the but fragmentary data left by Mr. Smith affiant had had no time to investigate the record in the Makainai case and had

been unable to sufficiently and adequately prepare the defense in said case and if forced to proceed at the time set he would be unable by reason of lack of preparation to fairly, fully and adequately present the defense. In support of the motion for a continuance Mr. W. S. Wise took the stand and testified in substance [283] that by reason of defective hearing he had not for the past two years undertaken any cases that required close attention; that although he had been present at the earlier partial trial of the Makainai case his associate, Mr. Smith, had conducted the trial; that he had made no preparation for the further trial of the case; that sometimes he heard what was going on in court and sometimes not; that he was senior counsel for Lalakea and had lately acted as one of his attorneys upon a hearing in connection with the estate matter and other matters that had consumed altogether eleven days; that he appeared as one of the plaintiff's attorneys upon the trial of the Todd case, but confined himself in the main to uncontested matters.

The Court denied the motion for a continuance. According to the transcript of the evidence the Court said: "The Court feels that this motion is largely discretionary and that it has been dispelled by the oral evidence of Judge Wise and that being the only reason presented at this time why the motion should not be granted the motion is therefore overruled." Either the stenographer did not get all that the Court said or the transcription is faulty. We take its meaning to be that whatever

doubt the Court might have entertained as to Mr. Wise's physical ability to proceed it was dispelled by the oral evidence of Judge Wise and the motion being largely discretionary that he would accordingly deny the motion. The Court had already, on June 17, expressed itself as satisfied that Mr. Wise was otherwise capable of handling the case. The Court in its decision on the merits enlarged upon its reasons for its denial of the motion for a continuance in the following language: "On June 28, 1920, Carlsmith & Rolph filed a motion for a continuance for one week, which motion for a continuance was predicated upon an affidavit signed by Mr. Carlsmith. If the motion was granted it would have meant a continuance of this case until September 1, 1920, as the statute prohibits the [284] trial of a case of this nature 'during July and August. The statute does not read that 'no trial shall be begun,' but that 'no trial shall be had,' etc. Testimony taken on the motion attempted to convey the impression to the Court that W. S. Wise would be of no assistance to associate counsel by reason of his deafness and Judge Wise demonstrated to the Court beyond the shadow of a doubt that his hearing is splendid. Mr. Wise has been counsel for defendant from the inception of this case and took an active part at the time plaintiff presented her evidence. Mr. Wise has been an active practitioner before the present Judge for the past four years. Mentally and physically his powers are unimpaired. He demonstrated in open Court that his hearing is good and he has been engaged in the active prac-

tice of his profession prior to and subsequent to this trial.”

Did the Court in denying the motion for a continuance abuse its discretion? We think not. The purpose of the continuance was to permit counsel to prepare himself upon the law and the facts of the case. The law had already been decided by this Court upon exceptions to the Court's denial of defendant's motion for a nonsuit. The same questions of law on the merits were presented on this appeal as upon the interlocutory appeal and we assume that the same situation existed below upon final submission. At the then stage of the case two definite issues of fact, to wit, forgery and nondelivery, were presented and had to be met by the defendant. The plaintiff had presented all her evidence in relation thereto upon rebuttal. The defendant was confined, and his preparation for trial limited, to these issues. It does not appear that all of the witnesses with knowledge of the facts were not called by either of the parties. The time intervening between June 17 and June 28, would appear to have been reasonably sufficient under all of the circumstances for counsel to prepare himself for further trial. The trial Court found that the associate counsel, Mr. Wise, had been the defendant's attorney during the entire course of the litigation and was well equipped to continue [285] so to act and it is to be assumed that he was well able to give his new associate valuable assistance in the premises. That other matters of this defendant en-

grossed counsel during that period is unfortunate. Counsel, however, when retained on June 17, was at liberty to refuse employment or secure further assistance of other attorneys in reference thereto and confine his energies to this case, which as far as we can ascertain from the record, was far superior in importance and amount involved. After the trial was concluded counsel on both sides were given ample opportunity to brief the law and the facts. The record fails to disclose that a motion for a new trial was made by defendant upon the ground of newly discovered evidence and in the absence of any showing that defendant was deprived of competent and material evidence it is to be presumed that all available evidence was submitted upon the trial.

That the Court assumed that the trial of a term case could not be continued during the months of July and August is immaterial. The ruling of the trial Court upon the motion for a continuance is not based solely upon that ground but upon all of the circumstances existing and brought to the attention of the Court.

Such other and further assignments of error not covered by the foregoing have been carefully considered and found without merit.

The judgment of the Trial Court is affirmed.

A. G. SMITH (C. S. CARLSMITH, W. H. SMITH and SMITH & WILD on the briefs),
for Plaintiff in Error.

J. LIGHTFOOT, HENRY HOLMES and H. EDMONDSON (LIGHTFOOT & LIGHTFOOT, H. HOLMES, H. EDMONDSON and J. W. RUSSELL, on the briefs), for Defendant in Error.

E. C. PETERS, ALEXANDER LINDSAY, Jr.,
RAY J. O'BRIEN.

[Indorsed]: No. 1345. Supreme Court, Territory of Hawaii. October Term, 1922. Hannah Makainai vs. Solomon K. Lalakea. Opinion. Filed November 10, 1922, at 2:10 P. M. J. A. Thompson, Clerk. [286]

[Title of Court and Cause.]

Judgment on Writ of Error.

In the above-entitled cause pursuant to opinion of the above-entitled court rendered and filed on the 10th day of November, 1922, the judgment of the trial court is affirmed.

Dated Honolulu, T. H., December 4, 1922.

By the Court:

[Seal] ROBERT PARKER, Jr.,
Deputy Clerk, Supreme Court.

[Indorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Judgment on Writ of Error. Rec'd and filed in the Supreme Court, Dec. 4, 1922, at 3:35 o'clock P. M. Robert Parker, Jr., Deputy Clerk.

I certify that I served a true copy of the within written judgment on writ of error upon Messrs. Carl S. Carlsmith and W. H. Smith, Attorneys for Solomon K. Lalakea, within named Defendant-Plaintiff in Error, by mailing a true copy thereof, postage prepaid, addressed to them at Hilo, Hawaii, this 4th day of December, 1922.

H. EDMONDSON,
Attorney for Plaintiff-Defendant in Error. [287]

[Title of Court and Cause.]

Notice of Judgment on Writ of Error.

To the Honorable HOMER L. ROSS, Judge of the
Circuit Court of the Fourth Circuit, Territory
of Hawaii.

YOU WILL PLEASE TAKE NOTICE that in
the above-entitled cause the Supreme Court has entered the following judgment on writ of error:

“JUDGMENT ON WRIT OF ERROR.

“In the above-entitled cause pursuant to opinion of the above-entitled court rendered and filed on the 10th day of November, 1922, the judgment of the trial court is affirmed.

Dated Honolulu T. H., December 4, 1922.

By the Court:

[Seal] (Signed) ROBERT PARKER, Jr.,
Deputy Clerk, Supreme Court.”

Dated Honolulu, T. H., December 4, 1922. [288]

By the Court:

[Seal] ROBERT PARKER, Jr.,
Deputy Clerk, Supreme Court.

The form of the foregoing notice is hereby approved and it is ordered that the same issue forthwith.

Dated Honolulu, T. H., December 4, 1922.

E. C. PETERS,
Chief Justice, Supreme Court.

[Indorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Notice of Judgment on Writ of Error. Rec'd and filed in the Supreme Court, Dec. 4, 1922, at 3:35 o'clock P. M. Robert Parker, Jr., Deputy Clerk. [289]

[Title of Court and Cause.]

Petition for Writ of Error and Supersedeas.

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

The above-named defendant-plaintiff in error, Solomon K. Lalakea, petitioner in the above-entitled cause, deeming himself aggrieved by the decision and judgment in said cause affirming the judgment of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii which judgment of the Supreme Court of the Territory of Hawaii was rendered on the 4th day of December, A. D. 1922, and claiming that there are manifest errors to the damage of the petitioner in the same, which errors are specifically set forth in the assignment of errors filed herewith, to which reference is hereby made, comes now by W. H. Smith, Esq., Carl S.

Carlsmith, Esq., and Smith & Wild, his attorneys, and hereby respectfully prays that a writ of error be allowed to him in the above-entitled cause and that he be allowed to prosecute the same to the United States Circuit Court of Appeals for the Ninth Circuit under and in accordance [290] with the laws of the United States in that behalf made and provided.

That an order be made fixing the amount of security the petitioner shall give and furnish upon said writ of error and that upon the giving of such security all proceedings relative to enforcement and execution of the judgment aforesaid and all other proceedings whatsoever in said cause in said Supreme Court of the Territory of Hawaii and said Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings, exhibits and papers in this cause duly authenticated for the correction of the errors so complained of and that a citation and supersedeas may issue.

And in this behalf the petitioner shows that the said judgment was rendered in an action at law and that the amount involved in said action, exclusive of costs, exceeds the sum or value of \$5,000.

Dated at Honolulu, T. H., this 6th day of February, A. D. 1923.

SOLOMON K. LALAKEA,
Petitioner.

[Seal]

By W. H. SMITH,
Per A. G. S.,
CARL S. CARLSMITH,
Per A. G. S.,
And SMITH & WILD,
His Attorneys. [291]

City and County of Honolulu,
Territory of Hawaii,—ss.

Arthur G. Smith, being first duly sworn, on oath deposes and says: That he is a member of the firm of Smith & Wild and one of the attorneys of the above-named petitioner Solomon K. Lalakea; that he has read the foregoing petition and knows its contents, and that the matters and things therein set forth are true of his own knowledge; and further, that the amount involved in the cause aforesaid exclusive of costs exceeds the sum or value of \$5,000.

ARTHUR G. SMITH.

Subscribed and sworn to before me this 6th day of February, A. D. 1923.

[Seal]

FLORENCE LEE,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

The foregoing petition is granted, a writ of error allowed and a bond on said writ of error is fixed at \$5,000.

Dated at Honolulu, T. H., this 6th day of February, A. D. 1923.

[Seal]

E. C. PETERS,
Chief Justice of the Supreme Court of the Territory of Hawaii.

[Indorsed]: Service of the within copy of petition for writ of error and supersedeas is hereby admitted this 6th day of February, A. D. 1923.

H. EDMONDSON,
One of the Attorneys for Hannah Makainai.
J. LIGHTFOOT.

No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Petition for Writ of Error and Supersedeas. Filed February 6, 1923, at 2:55 P. M. J. A. Thompson, Clerk, Supreme Court of Hawaii. W. H. Smith and Carl S. Carlsmith and Smith & Wild, Attorneys for Solomon K. Lalakea. [292]

[Title of Court and Cause.]

Assignment of Errors.

Now comes the above-named Solomon K. Lalakea, the defendant-plaintiff in error in the above-entitled cause, and says that there is manifest error in the record and proceedings in said cause in the Supreme Court of the Territory of Hawaii in this, to wit:

1. That the said Supreme Court erred in holding that there was no error in the record and proceed-

ings of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii on the trial of the case entitled "Hannah Makainai, Plaintiff, vs. Solomon K. Lalakea, Defendant," requiring a reversal of the judgment entered in that court on the 9th day of February, A. D. 1921.

2. That the said Supreme Court erred in holding that the Trial Judge committed no error on the 28th day of June, A. D. 1920, in refusing to grant the motion of the defendant for a continuance.

3. That the said Supreme Court erred in failing to hold [293] that the Trial Judge committed error in that, upon his own motion, he undertook an unnecessary, unfair and hostile examination of the defendant Solomon K. Lalakea while said defendant was upon the witness-stand as a witness on his own behalf.

4. That the said Supreme Court erred in not holding that the Trial Judge committed error upon the 1st day of September, 1920, and after both plaintiff and defendant had rested and submitted the cause for the consideration of the Court, in re-opening the said cause and calling, upon his own motion, to the witness-stand one O. T. Shipman and proceeding to examine the said witness.

5. That the said Supreme Court erred in not holding that the Trial Judge committed error by examining O. T. Shipman in a manner intended and calculated to prejudice the defendant in his cause.

6. That the said Supreme Court erred in not holding that the Trial Judge committed error in his

ruling, decision and finding that Thomas K. Lalakea never executed or delivered the deeds alleged to have been executed by him on March 6, 1915.

7. That the said Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“Their attitude entirely changed as to the defence between January 28, 1920, the date of the decision of the trial court overruling the motion for a nonsuit, and May 28, 1920, when they put in their defence.”

8. That the said Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“No explanation was offered or attempted as [294] to why Namahoe was sent for by Thomas K. Lalakea to witness his signature.”

9. That the said Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“The circumstances point to the fact that whoever signed these deeds they were signed the same day that T. K. Lalakea died.”

10. That the said Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“Upon these considerations alone this Court would be justified in finding that there was no delivery.”

11. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“In addition to these facts as bearing upon the question of delivery, the Court finds that this deed, together with the other deeds that had been prepared by Mr. Shipman, were still in the possession of the alleged grantor after his death. The defence took these deeds from the bureau which was the private bureau of the deceased and in which the other papers of T. K. Lalakea had been kept.”

12. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“But in view of the defendant’s positive testimony that he never kept these papers in the bureau, he cannot claim possession of the deed upon any possible theory that he kept this deed as his own.” [295]

13. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“The facts fall very far short of being sufficient to constitute a delivery.”

14. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“I find that from the situation as presented by the testimony of the defendant, even assuming such to be true, no other conclusion can be drawn than that T. K. Lalakea attempted to effect a testamentary disposition of his property.”

15. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“Thus, assuming the alleged deed to have been executed, there was no delivery sufficient to pass title.”

16. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“This is a mixed question of law and fact.”

17. That the Supreme Court erred in not holding that the Trial Judge committed error in his ruling, decision and finding as follows:

“This deed is testamentary in character and is good only as a Will.”

18. That the Supreme Court erred in affirming the judgment of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii made and entered on the 9th day of February, [296] A. D. 1921, wherein and whereby it was adjudged that the plaintiff-defendant in error recover and have restitution from the defendant-plaintiff in error of an undivided one-eighth interest in and to those certain pieces or parcels of real property more particularly described in the Amended Complaint, and that the plaintiff-defendant in error should have and recover from the defendant-plaintiff in error the sum of \$1,575 as and for damages and mesne profits and costs taxed in the sum of \$45.25.

19. That the Supreme Court erred in not vacating and setting aside the judgment of the Circuit Court

of the Fourth Judicial Circuit of the Territory of Hawaii made and entered on the 9th day of February, A. D. 1921, and in refusing to order a new trial of the said cause.

WHEREFORE said Solomon K. Lalakea, defendant-plaintiff in error, prays that the judgment of the Supreme Court of the Territory of Hawaii be reversed and that said Court be ordered to enter a judgment vacating and setting aside the judgment of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii and ordering a new trial of said cause in said Circuit Court.

Dated at Honolulu, T. H., this 6th day of February, A. D. 1923.

SOLOMON LALAKEA,

By W. H. SMITH,

Per U. E. W.,

And CARL S. CARLSMITH,

Per U. E. W.,

SMITH & WILD,

Attorneys for Solomon K. Lalakea, Plaintiff in Error. [297]

Service of the within copy of assignment of errors is hereby admitted this 6th day of February, A. D., 1923.

H. EDMONDSON,

One of the Attorneys for Hannah Makainai.

J. LIGHTFOOT.

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Assignment

of Errors. Filed February 6, 1923, at 2:55 P. M. J. A. Thompson, Clerk, Supreme Court of Hawaii. W. H. Smith and Carl S. Carlsmith and Smith & Wild, Attorneys for Solomon K. Lalakea. [298]

[Title of Court and Cause.]

Writ of Error.

United States of America,—ss.

The President of the United States of America
to the Honorable the Justices of the Supreme
Court of the Territory of Hawaii, GREET-
INGS:

Because in the record and proceedings as also in the rendition of judgment in the Supreme Court of the Territory of Hawaii before you in the case of Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error, manifest errors have happened to the great prejudice and damage of said Solomon K. Lalakea, Defendant-Plaintiff in Error, as appears by the petition herein,

We being willing that errors, if any have been made, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court [299] of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of San Francisco, State of California, and

filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit thirty (30) days after the date hereof to the end that the record and proceedings aforesaid being inspected the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 6th day of February, A. D. 1923.

Attest my hand and the seal of the Supreme Court of the Territory of Hawaii at the Clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court Territory of Hawaii.

Allowed this 6th day of February, A. D. 1923.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court. [300]

Service of the within copy of writ of error is hereby admitted this 6th day of February, A. D. 1923.

H. EDMONDSON,

One of the Attorneys for Hannah Makainai.

J. LIGHTFOOT.

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Writ of Er-

ror. Filed February 6, 1923, at 2:55 P. M. J. A. Thompson, Clerk, Supreme Court of Hawaii. W. H. Smith and Carl S. Carlsmith and Smith & Wild, Attorneys for Solomon Lalakea. [301]

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America
to Hannah Makainai, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, State of California, within thirty (30) days from the date of this writ pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Solomon K. Lalakea is plaintiff in error, and you are defendant in error, and show cause, if any there may be, why the judgment rendered against the said defendant-plaintiff in error as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, the Chief Justice of the Supreme Court of the United States this 6th [302] day of February, A. D. 1923.

[Seal]

E. C. PETERS,
Chief Justice of the Supreme Court of the Territory of Hawaii. [303]

Service of the within copy of citation on writ of error is hereby admitted this 6th day of February, A. D. 1923.

H. EDMONDSON,

One of the attorneys for Hannah Makainai.

J. LIGHTFOOT.

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Citation on Writ of Error. Filed February 6, 1923, at 2:55 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. W. H. Smith and Carl S. Carlsmith and Smith & Wild, Attorneys for Solomon K. Lalakea. [304]

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Solomon K. Lalakea, as principal, and Hawaiian Insurance and Guaranty Company, Limited, a corporation, duly organized under the laws of the Territory of Hawaii (authorized to do surety business in the Territory of Hawaii and having its principal office in Hilo, Hawaii), as surety, are held and firmly bound unto Hannah Makainai in the penal sum of Five Thousand Dollars (\$5,000.00), for the payment of which well and truly to be made to said Hannah Makainai, do

hereby bind ourselves and our respective heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such:

THAT WHEREAS on the 6th day of February, A. D. 1923, the above-named bounden principal sued out a writ of error [305] to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 4th day of December, A. D. 1922, by the Supreme Court of the Territory of Hawaii;

NOW, THEREFORE, if the said principal shall prosecute his said writ of error to effect and answer all damages and costs if he fails to sustain his writ of error then this obligation shall be void; otherwise it shall remain in full force, virtue and effect.

IN WITNESS WHEREOF the said principal has duly executed this instrument and the surety herein named has caused this instrument to be duly executed in its corporate name and behalf on this 9th day of February, A. D. 1923.

SOLOMON K. LALAKEA,

Principal.

HAWAIIAN INSURANCE & GUARANTY
CO., LTD.

By SAMUEL S. ROLPH,

Treasurer. (Seal)

The foregoing bond is approved and it is ordered that the same shall operate and take effect as a supersedeas.

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., this 10th day of February, A. D. 1923.

[Indorsed]: Service of the within copy of bond on writ of error is hereby admitted this 10th day of February, A. D. 1923.

H. EDMONDSON,

One of the Attorneys for Hannah Makainai.

No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Bond on Writ of Error. Filed February 10, 1923, at 1:49 P. M. J. A. Thompson, Clerk Supreme Court of Hawaii. W. H. Smith and Carl S. Carlsmith and Smith & Wild, Attorneys for Solomon K. Lalakea. [306]

[Title of Court and Cause.]

Praeipice for Transcript of Record.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii.

You will please prepare a transcript of the record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Ap-

peals for the Ninth Circuit and include in said transcript the following pleadings, opinions, judgments and papers on file in said cause, to wit:

- (1) Copy of petition for writ of error to Fourth Circuit Court, Territory of Hawaii, filed June 28, 1921;
- (2) Copy of assignment of errors, filed June 28, 1921;
- (3) Copy of bond on writ of error, filed June 28, 1921;
- (4) Copy of writ of error, filed June 28, 1921;
- (5) Copy of plaintiff's amended complaint, filed December 18, 1920;
- (6) Copy of defendant's answer, filed January 6, 1919; [307]
- (7) Copy of motion by the defendant to set cause for trial and copy of notice of motion, filed August 12, 1919;
- (8) Copy of motion by the defendant for nonsuit, filed January 27, 1921;
- (9) Copy of motion by defendant for continuance, and attached thereto a copy of the affidavit by Carl S. Carlsmith, filed June 28, 1920;
- (10) Copy of stipulation of the parties, filed December 13, 1920;
- (11) Copy of decision of Hon. Clement K. Quinn, filed February 7, 1921;
- (12) Copy of judgment entered and filed February 9, 1921;
- (13) Copy of defendant's exceptions to decision and findings, filed February 10, 1921;

- (14) Copy of clerk's minutes of the Fourth Circuit Court;
- (15) Copy of certificate of the clerk to the transcript of record, dated August 15, 1921;
- (16) Copy of transcript of testimony in three parts;
- (17) Copy of opinion of the Supreme Court of the Territory of Hawaii, filed November 10, 1922;
- (18) Copy of judgment on writ of error, filed December 4, 1922;
- (19) Copy of notice of judgment on writ of error, filed December 4, 1922;
- (20) Copy of petition for writ of error;
- (21) Copy of bond on writ of error;
- (22) All originals of all orders extending time for preparation and transmission of record from the Supreme Court of the Territory of Hawaii to the Ninth Circuit Court of Appeals;
- (23) In addition will you please prepare and send copies of the following Exhibits, which are also exhibits in the cause in the Supreme Court of the Territory of Hawaii entitled "Lilly Hewahewa vs. Solomon K. Lalakea, No. 1447."

Copy of—

- (a) Plaintiff's Exhibit "A," deed dated March 6, 1915, by T. K. Lalakea to George Lalakea, recorded in Liber 428, pp. 127-129;

- (b) Copy of Plaintiff's Exhibit "B," deed dated March 6, 1915, by T. K. Lalakea to Mrs. Jennie K. [308] Aona, Mrs. Mohihio Hewahewa and Mrs. Hana Makainai, recorded in Liber 428, pp. 131, 132;
- (c) Copy of Defendant's Exhibit 1, a deed dated March 6, 1915, by T. K. Lalakea to Solomon K. Lalakea, recorded in Liber 428, pp. 122-127.

And you will also prior to argument upon the above-entitled cause in the U. S. Circuit Court of Appeals for the Ninth Circuit forward the originals of each of the exhibits lettered (a), (b) and (c) above to the clerk of said court.

And in addition you will please transmit with the foregoing all of the following exhibits:

Plaintiff's Exhibit "B-1," certified copy of deed dated March 6, 1915, by T. K. Lalakea to Mrs. Jennie K. Aona, Mrs. Mohihio Hewahewa and Mrs. Hana Makainai, recorded in Liber 428, pp. 131, 132;

Plaintiff's Exhibit "C," being a lease dated March 20, 1915, between T. K. Lalakea and Hamada Kumadiro;

Defendant's Exhibit "A," for identification, a promissory note, dated November 7, 1906, signed by C. K. Maguire and T. K. Lalakea, payable to The First Bank of Hilo, Limited;

Defendant's Exhibit "B," for identification, a promissory note, dated June 4, 1909, signed by Samuel K. Pua, T. K. Lalakea and C. K. Maguire,

said note being secured by the assignment of the salary of the sheriff of the county of Hawaii for months of July, August and September, 1909, at the rate of \$200.00 per month;

Defendant's Exhibit "C," for identification, being a lease dated January 15, 1915, between Solomon K. Lalakea and C. Ah Yen;

Defendant's Exhibit "D," for identification, being a lease dated January 27, 1911, between T. K. Lalakea and Lum Chun;

Defendant's Exhibit "2," a lease dated November 30, 1913, between T. K. Lalakea and Fugimoto Nonosaku;

Defendant's Exhibit "2," a sketch drawn in pencil on yellow paper;

Defendant's Exhibit "3," a lease dated August 5, 1907, between T. K. Lalakea and Tsushima Ikei;

Defendant's Exhibit "3," a letter dated January 27, 1915, by Solomon K. Lalakea to Dear Papa;

Defendant's Exhibit "4," an envelope postmarked Honolulu, January 27, and addressed to "Mr. T. K. Lalakea, Hilo, Hawaii"; [309]

Defendant's Exhibit "4," a lease dated April 6, 1905, between T. K. Lalakea and Joao Martina.

You will also annex to and transmit with the record the original assignment of errors, the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, original citation with admission of service, your return to the writ of error under the seal of the Supreme Court of the Territory of Hawaii, and also your certificate stat-

ing in detail the cost of the record and by whom the same was paid.

Dated at Honolulu, T. H., this 19th day of February, A. D. 1923.

SMITH & WILD,
Attorneys for Plaintiff in Error.

[Indorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Praecipe for Transcript of Record. Filed February 19, 1923, at 10:10 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. Smith & Wild, 209-211 McCandless Building, Honolulu, T. H., Attorneys for Deft.-Ptf. in Error. [310]

[Title of Court and Cause.]

Order Extending Time to and Including April 27, 1923, to File Record and Docket Cause.

ORDER EXTENDING TIME FOR PREPARATION AND TRANSMISSION OF RECORD.

Upon application of counsel for the plaintiff in error and just cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Solomon K. Lalakea, and the Clerk of this Court, be, and they hereby are allowed until and including the 27th day of April, A. D. 1923, within which time to prepare and transmit to the Clerk of

the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the records in the above-entitled cause on assignment of errors in this court, together with said assignment of errors and all other papers required as a part of said record.

Dated at Honolulu, T. H., this 19 day of February, A. D. 1923.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii. [311]

Consent to the allowance of the foregoing order is hereby given.

_____,
_____,

Attorneys for Defendant in Error. [312]

[Endorsed]: No. 1345. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Order Extending Time for Preparation and Transmission of Record. Filed February 19, 1923, at 10:10 A. M. J. A. Thompson, Clerk Supreme Court of Hawaii. [313]

In the Supreme Court of the Territory of Hawaii. No. 1345. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Defendant in Error's Prae-

cipe on Writ of Error to United States Circuit Court of Appeals for the Ninth Circuit.

Service of a copy of the within praecipe admitted this 28th day of February, 1923.

SMITH & WILD,
Attorneys for Plaintiff in Error.

Filed February 28, 1923, at 11:40 A. M. J. A. Thompson, Clerk. J. Lightfoot and H. Edmondson, Attorneys for Defendant in Error. [314]

[Title of Court and Cause.]

Praecipe of Defendant in Error.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii.

In conjunction with and as a part of the record upon the writ of error to the United States Circuit Court of Appeals for the Ninth Circuit of Solomon K. Lalakea, above-named plaintiff in error, respecting which he filed his praecipe with you on February 19, 1923, you will please also prepare and certify the following additional portions of the record including them in their chronological order in said record, namely:

In Record No. 1345:

(1a) Original Plaintiff's Exhibit "I," being an account-book referred to in the Clerk's minutes now of record in your Court at pages 128 to 129, and also referred to in the transcript of evidence made and taken in the trial court. [315]

In Record No. 1257:

Copies of the following:

(2a) Interlocutory bill of exceptions and motion for allowance of same filed January 29, 1920;

(3a) Opinion of the Supreme Court of the Territory of Hawaii filed May 19, 1920;

(4a) Decision of exception filed May 21, 1920;

(5a) Notice of decision on exception filed May 21, 1920.

Dated, Honolulu, T. H., February 28, 1923.

Respectfully,

J. LIGHTFOOT,

H. EDMONDSON,

Attorneys for Defendant in Error Above Named.

[316]

Plaintiff's Exhibit "A."

Law 671—Ex. A.

Received in evidence December 18, 1919, and marked Plaintiff's Exhibit "A." Thomas Pedro, Jr., Clerk.

Law 875—Ex. D.

No. 1447. Office of the Clerk Supreme Court. Rec'd and Filed Nov. 21, 1922, at 10:05 A. M. J. A. Thompson, Clerk.

E

—

4

STAMP.

THIS INDENTURE made this 6th day of March, 1915, between T. K. LALAKEA of the first part, and GEORGE LALAKEA of the second part;

WITNESSETH:

That said party of the first part, in consideration of the sum of One Dollar to him paid by said party of the second part, the receipt whereof is hereby acknowledged, and in further consideration of the love and affection that he bears toward the said party of the second part as his son, hath hereby bargained, sold, conveyed and confirmed unto said party of the second part, all of his right, title, interest, claim and estate, whether in law or in equity, in and to the following described property, to wit:

1. All that certain tract of land situate at Waiakea, South Hilo, County and Territory of Hawaii, containing 21/100 of an acre, described in R. P. G. 1147 and conveyed by Kapena Hoe to him by deed dated the 18th. September 1912.
2. All that certain tract of land situate at Mokuhonua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132 conveyed to him by Joe Nabona Rock by deed dated the 17th. May 1898.
3. All that certain lot of land situate at Mokuhonua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132 conveyed to him by Kailiula by deed dated the 18th. May 1898.
4. All that certain tract of land situate at Mokuhonua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion

of the land described in R. P. G. 132 conveyed to him by deed dated the 10th. August 1898 by Kailiula.

5. All that certain tract of land situate at Mokuhonua, South Hilo aforesaid, being a $\frac{1}{2}$ interest in and to an undivided $\frac{5}{12}$ interest in 12 acres, a portion of the land described in R. P. G. 1034.

TO HAVE AND TO HOLD the above-described and granted property [317] together with all and singular the rights, tenements, hereditaments and appurtenances thereunto belonging unto said party of the second part for and during the term of the natural life of him the said party of the second part, with remainder over to his heirs in fee simple forever, saving and reserving however to myself the said grantor, party of the first part, the entire use and possession of the said premises and the rents and profits thereof during the remaining term of my life, and nothing in this deed shall be construed to give the said George Lalakea, party of the second part, any right of possession or otherwise in or to said property, until the death of myself the grantor herein.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first above written.

T. K. LALAKEA. [Seal]

D. NAMAHOE.

SOLOMON K. LALAKEA.

Territory of Hawaii,
County of Hawaii,—ss.

On this —— day of ——, before me personally appeared T. K. Lalakea, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

Notary Public, Fourth Judicial Circuit, Territory
of Hawaii. [318]

Territory of Hawaii,
County of Hawaii,—ss.

On this 8th day of May, A. D. 1915, before me, Charles F. Parsons, Judge of the Circuit Court of the Fourth Circuit, Territory of Hawaii, personally appeared D. Namahoe and Solomon K. Lalakea, both of Hilo, Hawaii, satisfactorily proved to me to be the same persons whose names are subscribed to the within instrument as witnesses thereto, by the oath of W. S. Wise, a credible witness for that purpose, who ^{being} ~~have~~ by me C.F.P. duly sworn, did severally depose and say that they reside in Hilo, in the County and Territory of Hawaii; that they both were present and saw T. K. Lalakea, who was personally known to each of them, to be the same person described in, and who executed the annexed instrument, freely and voluntarily sign, seal and deliver the same, and that they, the deponents each, thereupon and at

the request of the said T. K. Lalakea, subscribed their names thereto as witnesses.

STAMP

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Fourth Circuit Court, the day and year first above written.

[Seal]

CHARLES F. PARSONS,

Judge of the Circuit Court of the Fourth Circuit, Territory of Hawaii. [319]

W. S. Wise. 450 Hilo. 10592 9:16 George Lalakea. Indexed. Territory of Hawaii, Office of Registrar of Conveyances. Received for Record this 11th Day of May, A. D. 1915, at 9:16 o'clock A. M. and Recorded in Liber 428 on Pages 127-129, and compared. Chas. H. Merriam, Registrar of Conveyances. By ———, Deputy Registrar. Recording Fee \$4. Pd. W. S. Wise, Hilo—T. H. E/4 Pd. [320]

L. No. 875. Received in Evidence. Jan. 17, 1922, and marked ~~Deft's~~ Pltfs. Exhibit "D." Bernard H. Kelekolio, Asst. Clerk.

L. 875. Received for the Purpose of Identification and Marked Pltfs. Exhibit "D." Bernard H. Kelekolio, Asst. Clerk.

No. 1257. Recd. and Filed in the Supreme Court January 31, 1920, at 10:25 A. M. J. A. Thompson, Clerk.

No. 1345. Recd. and Filed in the Supreme Court August 16, 1921, at 10:20 A. M. J. A. Thompson, Clerk. [320]

Plaintiff's Exhibit "B."

Law 671. Ex. B.

E

2.50

Law 875. Ex. "E."

No. 1447. Office of the Clerk Supreme Court.
Received and Filed Nov. 21, 1922, at 10:05 A. M.
J. A. Thompson, Clerk.

STAMP

THIS INDENTURE made this 6th day
of March, 1915, between T. K. LALAKEA
of the first part, and MRS. JENNIE K.
AONA, MRS. MOHIHIO HEWAHEWA
and MRS. HANA MAKAINAI of the sec-
ond part, and all of the City of Hilo, County
and Territory of Hawaii;

WITNESSETH:

That said party of the first part, in considera-
tion of the sum of ONE DOLLAR to him paid by
said parties of the second part, the receipt whereof
is hereby acknowledged, and in further considera-
tion of the love and affection which he bears to-
wards them, hath hereby bargained, sold, conveyed
and confirmed unto said parties of the second part
all of his right, title, interest, estate and claim,
whether in law or in equity, in and to a $\frac{1}{4}$ interest
undivided in that certain tract of land situate at
Mokuhonua, South Hilo, County of Hawaii afore-
said, being the premises described in R. P. G. 1034
and containing 12 acres.

TO HAVE AND TO HOLD the above-described and granted property together with all and singular the rights, tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, unto said parties of the second part for and during the term of their natural lives, remainders over to their heirs in fee simple forever, saving and reserving however to myself the entire use and possession of the said premises and the rents and profits thereof during the remaining term of my life, and nothing in this deed shall be construed to give the said parties of the second part any right of possession or otherwise in or to said property, until the death of myself the grantor herein.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first above written.

T. K. LALAKEA. [Seal]

D. NAMAHOE.

SOLOMON K. LALAKEE.

Law No. 671. Received in Evidence December 18, 1919, and marked Plaintiff's Exhibit "B." Thomas Pedro, Jr., Clerk. [321]

Territory of Hawaii,
County of Hawaii,—ss.

On the 8th day of May, A. D. 1915, before me, Charles F. Parsons, Judge of the Circuit Court of the Fourth Circuit, Territory of Hawaii, personally appeared D. Namahoe and Solomon K. Lalakea, both of Hilo, Hawaii, satisfactorily proved to me to be the same persons whose names

are subscribed to the within instrument as witnesses thereto, by the oath of W. S. Wise, a being credible witness for that purpose, who ~~have~~ C. F. P. by me duly sworn, did severally depose and say that they reside in Hilo, in the County and Territory of Hawaii; that they both were present and saw T. K. Lalakea, who was personally known to each of them, to be the same person described in and who executed the annexed instrument, freely and voluntarily sign, seal and deliver the same, and that they, the deponents each, thereupon and at the request of the said T. K. Lalakea, subscribed their names thereto as witnesses.

STAMP

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Fourth Circuit Court, the day and year first above written.

[Seal]

CHARLES F. PARSONS,
Judge of the Circuit Court of the Fourth Circuit,
Territory of Hawaii. [322]

Received for the Purpose of Identification and Marked Pltf's. Exhibit "E." Bernard H. Kelekolio, Asst. Clerk.

No. 1257. Recd. and Filed in the Supreme Court January 31, 1920, at 10:25 A. M. J. A. Thompson, Clerk.

No. 1345. Recd. and Filed in the Supreme Court August 16, 1921, at 10:20 A. M. J. A. Thompson, Clerk.

L. No. 875. Received in Evidence Jan. 17, 1922, and Marked ~~Def't's~~ Plft's. Exhibit "E." Bernard H. Kelekolio, Asst. Clerk.

W. S. Wise. 3—Hilo. 10594. 9:18. Indexed. Territory of Hawaii, Office of Registrar of Conveyances. Received for Record this 11th Day of May, A. D. 1915, at 9:18 o'clock A. M. and Recorded in Liber 428 on Pages 131-132, and compared. Chas. H. Merriam, Registrar of Conveyances. By _____, Deputy Registrar, Recording Fee, E

\$2.50. Pd. W. S. Wise. Hilo—T. H. 2.50 Pd. [323]

Defendant's Exhibit 1.

E

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9

Law 671. Ex. "1."

Law 875. Ex. "A."

Law No. 671. Received in Evidence December 18, 1919, and marked Defendant's Exhibit "1." Thomas Pedro, Jr., Clerk.

STAMP

THIS INDENTURE made this 6th day of March, 1915, between T. K. LALAKEA of the first part, and SOLOMON K. LALAKEA of the City of Honolulu, of the second part;

WITNESSETH:

That said party of the first part, in consideration of the sum of ONE DOLLAR to him

paid by the said party of the second part, the receipt whereof is hereby acknowledged, and in further consideration of the love and affection that he bears toward the said party of the second part as his son, hath hereby bargained, sold, conveyed and confirmed unto the said party of the second part, all of his right, title, interest, claim and estate, whether in law or in equity, in and to the following described property, to wit:

1. All that certain tract of land situate at Kaliu, Honolulu, Oahu, described in R. P. Grant 7344, conveyed to him by Charles A. Long by deed dated the 26th. September, A. D. 1910.
2. All that certain tract of land situate at Kukuihaele, Hamakua, County and Territory of Hawaii, described in R. P. 933, conveyed to him by Keamo by deed dated the 16th. October, 1903, containing an area of 103 acres more or less and being a portion undivided, of the Estate of Mokeawe, deceased.
3. All that certain tract of land situate at Kukuihaele aforesaid, described in R. P. 933, conveyed to him by Pihana (W) by deed dated the 18th. November, 1911, containing 103 acres, more or less and being a portion undivided, of the Estate of Mokeawe.
4. All that certain tract of land situate at Kaiwilahilahi, North Hilo, County of Hawaii aforesaid, described in R. P. 2729 conveyed

to him by J. Poka Hanaaumoe by deed dated the 14th. September, 1885.

5. All that certain tract of land situate at Waiakea, South Hilo, County of Hawaii aforesaid, conveyed to him by the Reverend W. M. Kalaiwaa by deed dated the 3rd. December, 1908.
6. All that certain tract of land situate at Punahoa 1, South Hilo aforesaid, containing .48 acres, described in R. P. 2178 L. C. A. 463, conveyed to him by deed of S. Kane dated the 8th. August, [324] 1899.
7. All that certain tract of land situate at Papaa, South Hilo aforesaid, containing 11 acres, described in R. P. 1948 L. C. A. 190, conveyed to him by S. Kane by deed dated the 8th. August, 1899.
8. All that certain tract of land situate at Kapehu, North Hilo aforesaid, containing .48 acres, described in R. P. 1393, conveyed to him by S. Kane by deed dated the 8th. August, 1899.
9. All that certain tract of land situate at Punahoa 2, South Hilo aforesaid, containing .50 acres, described in R. P. 1149 L. C. A. 387 conveyed to him by Kalaona Kalana by deed dated the
10. All that certain tract of land situate at Puueo, South Hilo aforesaid, containing .75 acres, conveyed to him by Hokukela by deed dated the

11. All that certain tract of land situate at Kauhiula, South Hilo aforesaid, containing 14.33 acres, described in R. P. 133, conveyed to him by Mana and Iakoba by deed dated the 27th. November, 1883.
12. All that certain tract of land situate at Punahoa 2, South Hilo aforesaid, containing 835 square feet, conveyed to him by the First Hawaiian Church of Hilo by deed dated the 12th. February, 1908.
13. All those two certain lots situate at Kukuau, South Hilo aforesaid, containing respectively 1407.38 and 4592.18 square feet, and all that certain lot situate at Waiohinu, Kau, County of Hawaii aforesaid, containing 3 acres, described in R. P. 6646, and also that certain lot situate at Halepuna, South Hilo aforesaid, containing 1 acre, more or less, described in R. P. 2979, all of which said lots were conveyed to him by Mrs. Kaili Keolanui by deed dated the 27th. November, 1908, and recorded in the Hawaiian Registry of Conveyances in Liber 340, pages 410, 411.
14. All that certain tract of land situate at Honomanu, County of Maui, containing 3.45 acres, conveyed to him by Kealikuloa by [325] deed dated the 15th. August, 1901, and recorded in the Hawaiian Registry of Conveyances in Liber 225, on pages 26, 27.
15. All that certain lot situate at Olaa, Puna, County of Hawaii aforesaid, containing 10

acres, designated as Lot 37 and described in L. P. 5066, together with that certain lot situate at said Olaa, designated as Lot 38 and described in L. P. 4942, both of which said lots were conveyed by Kini Koakulana to him by deed dated the 27th. November, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 355, on pages 351, 352.

16. All that certain lot situate at Kaiwiki, South Hilo aforesaid, containing 10 acres, described in R. P. 4119, conveyed to him by Yamafushi Keokishi by deed dated the 9th. November, 1903, and recorded in the Hawaiian Registry of Conveyances in Liber 250, on pages 4, 5.
17. All that certain lot of land situate at Kaiwiki, South Hilo aforesaid, containing 16.75 acres, described in R. P. 4298 and conveyed to him by Watanabe Toyosuke by deed dated the 8th. December, 1902, recorded in the Hawaiian Registry of Conveyances in Liber 241, on pages 351-356.
18. A $\frac{1}{4}$ interest undivided in and to that tract of land situate at Kalapana, Puna aforesaid, conveyed to him by Sam Kanakaole by deed dated the 8th. December, 1911, and recorded in the Hawaiian Registry of Conveyances in Liber 352, on pages 422-424.
19. All that certain lot of land situate at Halepuaa, Puna aforesaid, containing 4.22 acres, de-

scribed in R. P. 998, and conveyed to him by M. K. Kealawaa by deed dated the 2nd. February, 1906, and recorded in the Hawaiian Registry of Conveyances in Liber 340, on pages 38, 39.

20. All that certain tract of land situate at Kukuihaele, Hamakua aforesaid, containing 3.35 acres, described in R. P. 7872 and conveyed to him by Elisa Hawailepolepo by deed dated the 20th. June, 1905, and recorded in the Hawaiian Registry of Conveyances in Liber 370, on pages 384, 385.
21. All that certain tract of land situate at Maonolulu, North Hilo [326] aforesaid, containing 81 acres, described in R. P. 2320.
22. All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him by Joe Nabona Rock by deed dated the 17th. May, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 181, pp. 205, 206.
23. All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him by Kailiula by deed dated the 18th. May, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 183, pages 82, 83.

24. All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being an undivided $\frac{1}{2}$ interest in and to that portion of the land described in R. P. G. 132, conveyed to him by Kailiula by deed dated the 10th. August, 1898, and recorded in the Hawaiian Registry of Conveyances in Liber 186, pp. 71, 72.
25. All that certain tract of land situate at Moku-honua, South Hilo aforesaid, being a $\frac{1}{2}$ interest in and to an undivided $\frac{5}{12}$ interest in 12 acres, a portion of the land described in R. P. G. 1034.

TO HAVE AND TO HOLD the above-described and granted property together with all and singular the rights, tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining unto said party of the second part for and during the term of the natural life of him, the said party of the second part, with remainder over to his heirs in fee simple forever, saving and reserving however to myself, the said grantor, party of the first part herein, the entire use and possession of the said premises and the rents and profits thereof during the remaining term of my life, and nothing in this deed shall be construed to give to the said Solomon K. [327] Lalakea, party of the second part, any right of possession or otherwise in or to said property, until the death of myself, the grantor herein.

IN WITNESS WHEREOF I have hereunto set my hand and seal the day and year first above written.

D. NAMAHOE.

T. K. LALAKEA. (Seal)

SOLOMON K. LALAKEA.

Territory of Hawaii,
County of Hawaii,—ss.

On this — day of —, before me personally appeared T. K. Lalakea, to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

_____,
Notary Public, Fourth Judicial Circuit, Territory
of Hawaii. [328]

Territory of Hawaii,
County of Hawaii,—ss.

On this 8th day of May, A. D. 1915, before me, Charles F. Parsons, Judge of the Circuit Court of the Fourth Circuit, Territory of Hawaii, personally appeared D. Namahoe and Solomon K. Lalakea, both of Hilo, Hawaii, satisfactorily proved to me to be the same persons whose names are subscribed to the within instrument as witnesses thereto, by the oath of W. S. Wise, a credible witness for that
being
purpose, who have by me duly sworn, *dis* C. F. P.
severally depose and say that they reside
in Hilo, in the County and Territory of Hawaii;

that they both were present and saw T. K. Lalakea, who was personally known to each of them, to be the same person described in and who executed the annexed instrument, freely and voluntarily sign, seal and deliver the same, and that they, the deponents each, thereupon and at the request of the said T. K. Lalakea, subscribe their names thereto as witnesses.

STAMP IN WITNESS WHEREOF, I have here-
unto set my hand and affixed the seal of
said Fourth Circuit Court, the day and year
first above written.

(Seal) CHARLES F. PARSONS,
Judge of the Circuit Court of the Fourth Circuit,
Territory of Hawaii. [329]

No. 1257. Rec'd and Filed in the Supreme Court
January 31, 1920, at 10:25 A. M. J. A. Thompson,
Clerk.

No. 1345. Recd. and Filed in the Supreme Court
Aug. 16, 1921, at 10:20 A. M. J. A. Thompson,
Clerk.

L. No. 875. Received in Evidence. Jan. 16,
1922, and Marked Pltfs. Exhibit "A." Bernard
H. Kelekolio, Asst. Clerk.

No. 1447. Office of the Clerk Supreme Court.
Recd. and Filed Nov. 21, 1922, at 10.05 A. M. J. A.
Thompson, Clerk.

W. S. Wise. 9:00 Hilo. 10591/9:15. Indexed.
Territory of Hawaii. Office of Registrar of Con-
veyances. Received for Record this 11th day of
May A. D. 1915, at 9:15 o'clock A. M. and Recorded

in Liber 428 on Pages 122-127, and Compared.
Chas. H. Merriam, Registrar of Conveyances. By
———, Deputy Registrar. Recording Fee \$9.
Pd. Refund \$2.95. W. S. Wise. Hilo, T. H. E.

9

Pd. [330]

In the Supreme Court of the Territory of Hawaii. No. 1345. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Order for Transmission of Original Exhibit. Filed March 21, 1923, at 10:00 A. M. J. A. Thompson, Clerk.

Service of a copy of the within written order is admitted this 21st day of March, 1923.

(Sgd.) SMITH & WILD,

Attorneys for Plaintiff in Error.

J. LIGHTFOOT,

H. EDMONDSON,

Attorneys for Defendant in Error. [331]

[Title of Court and Cause.]

Order for Transmission of Original Exhibit.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii.

You are hereby authorized and directed in connection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled suit to transmit as part of the record required by the praecipe of the defendant in error, the following exhibit upon her counsel undertaking to return it to the files of this Court:

1a. Plaintiff's Exhibit "I" being an account-book referred to in the Clerk's minutes now of record in this court at pages 128 to 129 and also referred to in the transcript of evidence made and taken in the trial court.

Dated, Honolulu, T. H., March 21, 1923.

[Seal] (Sgd.) E. C. PETERS,
Chief Justice of the Supreme Court, Territory of
Hawaii. [332]

In the Supreme Court of the Territory of Hawaii. No. 1345. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Undertaking to Return Original Exhibit. Filed March 21, 1923, at 10:00 A. M. J. A. Thompson, Clerk.

Service of a copy of the within written undertaking is admitted this 31st day of March, 1923.

(Sgd.) SMITH & WILD,

Attorneys for Plaintiff in Error.

J. LIGHTFOOT,

H. EDMONDSON,

Attorneys for Defendant in Error. [333]

[Title of Court and Cause.]

Undertaking to Return Original Exhibit.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii.

We hereby undertake to return to the files of the Supreme Court of the Territory of Hawaii the following original exhibit sent to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the order of the Chief Justice of the Supreme Court of the Territory of Hawaii:

- 1a. Plaintiff's Exhibit "I," being an account-book referred to in the Clerk's minutes now of record in this Court at pages 128 to 129 and also referred to in the transcript of evidence made and taken in the trial court.

Dated, Honolulu, T. H., March 21st, 1923.

J. LIGHTFOOT,

H. EDMONDSON,

Counsel for Defendant in Error. [334]

[Title of Court and Cause.]

Interlocutory Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came duly on for hearing before this Court, without a jury, no jury having been demanded by either of the parties, and that at the trial the following exception was duly taken by the defendant and allowed:

EXCEPTION.

The plaintiff having rested her case, the defendant introduced as evidence the deed under which he claims, and the plaintiff thereupon introduced evidence for the purpose of rebutting the claim to title made by the defendant under the said deed and rested, as more fully appears from the official transcript on file in this court and cause. Whereupon the defendant filed a motion for nonsuit, the same being on file herein, and based upon the following grounds:

I. That the plaintiff has not presented any evidence herein in support of her declaration.

II. That the plaintiff has not introduced evidence sufficient to entitle her to a judgment by this Court in her favor. [335]

III. That the plaintiff has failed to sustain all the necessary allegations in her declaration.

Which motion was overruled by the Court, to which ruling the defendant duly excepted, which exception was allowed by the Court. Thereupon counsel for the defendant requested the Court to

grant an interlocutory bill of exceptions on the said ruling upon the motion for a nonsuit, which request was granted by the Court.

And the said defendant thereafter, to wit, upon the 29th day of January, 1920, and within the time allowed by law and the orders of this Court, has duly filed his bill of exceptions and has prayed for the allowance thereof, and the same being found to be in all respects conformable with the truth, the said interlocutory bill of exceptions is hereby approved, sealed and allowed.

Furthermore, defendant having prayed that certain portions of the record, evidence, exhibits, findings and rulings be made a part of this bill:

IT IS HEREBY ORDERED that the plaintiff's declaration, the defendant's answer thereto, all of the evidence offered by the parties, including the exhibits, the reporter's transcript of oral evidence taken in Court, the defendant's motion for nonsuit, and the ruling of the Court thereon be made a part of this bill of exceptions as fully to all intents and purposes as if the same were incorporated herein.

WITNESS my hand and the seal of this Court on the 29th day of January, 1920.

[Seal] CLEMENT K. QUINN,
Judge of the Circuit Court of the Fourth Circuit,
Territory of Hawaii.

O. K.—J. W. RUSSELL. [336]

[Title of Court and Cause.]

Motion for Allowance of Interlocutory Bill of Exceptions and Incorporation of Record.

Comes now the defendant above-named, by his attorneys of record, and prays that the foregoing interlocutory bill of exceptions be allowed and sealed, and that the pleadings, exhibits, evidence and transcript thereof, together with the motion for nonsuit herein and the ruling of the Court thereon, be incorporated in and made a part of the foregoing bill of exceptions, and that the same be certified to by the Clerk of this Court and sent forward to the Clerk of the Supreme Court, that the said cause may be heard by the said Supreme Court upon this interlocutory bill of exceptions.

Dated at Hilo, Hawaii, this 29th day of January, 1920.

W. S. WISE,
W. H. S.,
W. H. SMITH,
Attorneys for the Defendant.

[Endorsed]: L. No. 671. Doc. 3, Pg. 92. In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. Law—No. 671. Hannah Makainai, Plaintiff, vs. Solomon K. Lalakea, Defendant. Ejectment. Interlocutory Bill of Exceptions and Motion for Allowance of Interlocutory Bill of Exceptions and Incorporation of Record. Filed at 10:35 o'clock A. M., January 29, 1920.

Thomas Pedro, Jr., Clerk. W. H. Smith and W. S. Wise, Attorneys for Defendant. [337]

[Title of Court and Cause.]

Opinion.

EXCEPTIONS FROM CIRCUIT COURT,
FOURTH CIRCUIT.

Hon. C. K. QUINN, Judge.

Argued May 12, 1920.

Decided May 19, 1920.

COKE, C. J., KEMP, J., and Circuit Judge
BANKS in Place of EDINGS, J., Absent.

Trial—Nonsuit.

This Court will not disturb the ruling of a Circuit Judge denying defendant's motion for a nonsuit at the close of plaintiff's evidence in rebuttal in a jury-waived trial if the evidence would have justified submitting the questions of fact to a jury.

Same—Same.

To authorize the Court to take the question from the jury the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.

Evidence—Sufficiency.

A mere scintilla of evidence is insufficient to support a finding of fact and to amount to more than a mere scintilla the evidence must be of a character sufficiently substantial in view of

all the circumstances of the case to warrant the jury (or Judge) as trier of the facts in finding from it the fact to establish which the evidence was introduced. [338]

OPINION OF THE COURT BY KEMP, J.

This is an action in ejectment by Hannah Makainai against her brother Solomon K. Lalakea to recover from him the land described in her complaint and damages for its retention. The defendant answered by general denial and the cause came to trial before the Circuit Judge jury-waived. At the beginning of the trial and before any evidence was introduced a stipulation was entered into by the parties in open court as to certain facts which were stated by the attorney for the defendant in substantially the following language: We admit that T. K. Lalakea mentioned in the declaration was in his lifetime and prior to the execution or alleged execution, or prior to the date of a certain deed dated March 6, 1915, which will be offered in evidence by defendant, seized of the pieces of land named in the declaration; that T. K. Lalakea died intestate on the 7th day of May, 1915; that Hannah Maikainai was an heir at law of T. K. Lalakea, deceased. These stipulations are subject to an agreement by counsel that we may offer in evidence, and that there will be no objection to accepting in evidence, a certain deed purporting to be executed by T. K. Lalakea to Solomon K. Lalakea, bearing date March 6, 1915, and, according to the office of the Registrar of Conveyances in Honolulu, entered upon the 11th day of May,

1915, in liber 428, pages 122-127; and that that deed shall be considered by them as constituting a *prima facie* case upon the part of the defendant. This statement of the stipulation was agreed to by the attorney for the plaintiff with the further statement that the stipulation should contain the fact that the defendant is in possession of the land, which was agreed to by the attorney for the defendant. With this stipulation the plaintiff rested and with the introduction in evidence of the [339] deed referred to defendant also rested. The plaintiff thereupon introduced certain evidence for the purpose of rebutting the validity of the deed introduced in evidence by the defendant, the evidence offered being directed to the questions of whether or not the deed in question was ever delivered to the defendant by T. K. Lalakea in his lifetime and whether or not the signature to said deed was in fact the signature of said T. K. Lalakea. It was then further stipulated that if the plaintiff is entitled to recover she is entitled to an undivided one-eighth interest in the land in question. Plaintiff having introduced her evidence on these issues again rested and the defendant moved for a nonsuit upon the following grounds: (1) That the plaintiff has not presented any evidence herein in support of her declaration; (2) that the plaintiff has not introduced evidence sufficient to entitle her to a judgment by this court in her favor; (3) that the plaintiff has failed to sustain all the necessary allegations in her declaration. The motion

for nonsuit was overruled, to which ruling an exception was taken by counsel for the defendant. Defendant was thereupon at his request granted an interlocutory bill of exceptions which was transmitted to this court.

The interlocutory bill of exceptions presents only one exception for the consideration of this Court at this time, namely, the exception to the overruling of the motion for a nonsuit. This involves of course an examination of the evidence introduced by the plaintiff to substantiate her claim that the deed was never executed by her father T. K. Lalakea, and if executed was never delivered to the defendant.

The deed mentioned in the stipulation and introduced in evidence by defendant bears date March 6, 1915. It purports to have been executed by T. K. Lalakea and is witnessed by D. Namahoe, and Solomon K. Lalakea the grantee therein named. This [340] deed was not proven for record in the lifetime of the grantor but on May 8, 1915, the day following the grantor's death, the subscribing witnesses appeared before the Circuit Judge at Hilo, produced said deed and made proof of its execution in the manner required by the statute. With the Circuit Judge's certificate of proof attached said deed was immediately forwarded by the defendant to Honolulu to the registrar of conveyances and entered of record on May 11, as stated in the stipulation. This made a *prima facie* case for the defendant both as to the execution and the delivery of the deed and placed the burden of going forward

with the evidence as to these issues on the plaintiff. What then was the evidence produced by the plaintiff to overcome the *prima facie* case made by the defendant?

To begin with, in December, 1914, T. K. Lalakea had his attorney, Mr. O. T. Shipman, draft about a half dozen deeds among which was the deed in question. The other deeds were to various other of his children and if all had been executed and delivered would have disposed of all, or practically all, of his large and valuable estate. By far the greater part of his valuable lands were included in the deed to his son Solomon, the defendant herein. Mr. Shipman was at that time, and had been for a period of four or more years the regular legal adviser of Lalakea senior and was a notary public. Lalakea habitually went to Mr. Shipman to have his conveyancing done and to have his acknowledgments taken. It appears that after drafting these deeds Mr. Shipman delivered them to his client and at various times thereafter had conversations with him about the execution thereof, the last of which was about April 20, 1915. It is significant that one of these conversations took place on the 6th of March, the very day that the deeds purport to have been executed. What these conversations were the witness was not permitted to say. One of [341] the other deeds drawn by Mr. Shipman at the same time he drew the deed in question was to the plaintiff and two of her sisters jointly. It is admitted that this deed was not delivered to the plaintiff personally by her father, but like the deed

in question was proven for record by the same subscribing witnesses before the Circuit Judge on the day following the death of the grantor, and by the defendant sent to Honolulu for record. One of the other grantees named in the deed to the plaintiff has also testified that it was never delivered to her but that some two years after it was recorded was sent to her by defendant. Mr. Shipman has testified that about ten minutes before he heard of the death of Lalakea, Senior, the defendant came to his office "in a big fuss and wanted me to go right over to Lalakea's residence, stating that he was in pilikia, in a bad way, and wanted me to go over right away and go over to see about these deeds—these half a dozen deeds I had originally drafted and delivered to T. K. Lalakea. I asked him if Mr. Lalakea was conscious to know what he was doing. He did not think he was. Solomon didn't think he was really conscious. I said it is of no use for me to go, I could not do anything for you. It is too late." Mr. Shipman was unable to state whether the defendant stated that he wanted him to have the old man sign and take his acknowledgment or simply to take his acknowledgment, but he states positively that he wanted acknowledgments taken in connection with the deeds mentioned. It also appears from the evidence of the plaintiff and her sister Mrs. Hewahewa that within one hour after the death of their father the defendant went into the room of their father's residence formerly occupied by him, unlocked the drawers of his bureau and took therefrom a bundle

of papers, wrapped them in a towel and left the house. They state in effect that this bureau was at all times kept locked by their father in his lifetime and in it he kept his [342] papers, money, etc.; that for a short time prior to their father's death their brother Solomon had been looking after their father's business and during that time carried the key to said bureau, but that he (Solomon) kept his papers in another room in a writing-desk. They did not attempt to say that the papers taken from the bureau by Solomon at this time included the deed in question but they both described the papers as being part white and part blue, which description corresponds with the deeds to the defendant and various other children, three of which are exhibits in this case. Then we have the further fact that on the day following the death of their father the son Solomon produced the deed to himself and the deeds to the other children before the Circuit Judge and had them proved for record and sent to the registrar of conveyances for record without consulting any of the other grantees who have so far testified in this case. In addition to this line of testimony showing the actions of the defendant just before and just after his father's death three witnesses who knew the deceased well for a number of years before his death and who were familiar with his signature have testified just as positively as any witness could who gives his opinion that in their opinion the signature to the deed relied upon by the defendant is not the signature of T. K. Lalakea. These witnesses were

thoroughly cross-examined on this branch of their testimony and each supported his opinion by as good reasons as could be expected in a matter of this kind. There were also produced several admitted genuine signatures of T. K. Lalakea which the witnesses compared with the signature to defendant's deed and pointed out points of difference. The Circuit Judge was also at liberty to make his own comparisons between the genuine signatures and the signature to the deed in question. [343]

The defendant makes two contentions as to the sufficiency of the plaintiff's evidence to support her claims: (1) That the evidence as to the nondelivery of the deed to the defendant merely raises a suspicion and is not legally sufficient to support a finding that the deed was never delivered; (2) that opinion evidence is not legally sufficient to overcome the direct testimony of the subscribing witness attached to the deed that it was executed and delivered in his presence.

It is important before proceeding to an application of the evidence to determine the rule of law by which the Circuit Judge is to be governed in ruling upon a motion for a nonsuit. It has been held many times by this Court that a mere scintilla of evidence is insufficient to support a finding of fact and that to amount to more than a mere scintilla the evidence must be of a character sufficiently substantial in view of all the circumstances of the case to warrant the jury (or Judge) as trier of the facts in finding from it the fact to establish which the evidence was introduced. (*Holstein vs.*

Benedict, 22 Haw. 441.) The Circuit Judge having overruled the motion for a nonsuit we are in the same position and must be governed by the same rules of law as would govern had the case been submitted to a jury for determination upon the facts, that is, if the court would have been justified in submitting the questions of fact to a jury the circuit judge's ruling will not be disturbed. The Supreme Court of Texas in *Lee vs. Ry. Co.*, 89 Tex. 588 (36 S. W. 65), said: "To authorize the Court to take the question from the jury the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it." In *Mynning vs. R. R. Co.*, 64 Mich. 93 (31 N. W. 147), the rule is stated thus: "If the circumstances are such that reasonable minds might draw different conclusions [344] respecting the plaintiff's fault he is entitled to go to the jury upon the facts. The Judge takes the case from the jury only when it is susceptible of but one just opinion." These cases are quoted with approval in *Joske vs. Irvine*, 44 S. W. 1059, one of the cases upon which the defendant in this case strongly relies.

From a careful examination of the cases it appears that it is the duty of the Court to instruct a verdict though there be slight testimony if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the facts sought to be established. Such testimony in legal contemplation falls short of being any evidence. But it is the duty of the Court to determine

whether the testimony has more than that degree of probative force and if the Court determines that it has the law presumes that the jury could reasonably infer therefrom the existence of the alleged fact.

We are then called upon to determine whether the testimony in this case does more than create a mere surmise or suspicion that T. K. Lalakea never delivered the deed in question to the defendant. We think that it does. It shows clearly that within a few minutes of the death of his father the defendant was seeking the aid of an attorney and notary public to have the deed acknowledged by his father; that within a very short time after his father's death he went into the room occupied by his father prior to his death and took therefrom papers which it might be inferred included the deed in question; it also shows that several other deeds were made by the same grantor at the same time, under the same circumstances, conveying other property to the defendant's brothers and sisters and that these deeds, or at least some of them, were never delivered. The evidence as to the genuineness of the grantor's signature is not without bearing upon this issue. If as might be found from the evidence of the three witnesses to which we have referred the deed was never executed [345] by T. K. Lalakea this fact would have a strong bearing upon the question of the delivery or nondelivery of the deed.

On the question of whether or not opinion evidence is legally sufficient to overcome the testimony

of the subscribing witness attached to the deed defendant relies largely upon the case of *Mut. Ben. Life Ins. Co. vs. Brown*, 32 N. J. E. 809, and the vice-chancellor's opinion in the same case reported in 30 N. J. E. 193. The vice-chancellor's decision is particularly relied upon for the contention of the defendant that the proof that the signature is not T. K. Lalakea's does not join an issue as to the execution of the deed in question because, as he says, the deed could have been signed by the hand of a third person at the request of the grantor and still have been his free act and deed. Whether this is true or not we need not decide as under the facts so far presented in this case the question of the validity of such a signature is not presented. The certificate attached to the deed in question recites that the subscribing witness testified that he saw T. K. Lalakea voluntarily sign and deliver the same. Until it is made to appear in some manner that the deed in question was signed by someone other than the grantor at his request we must assume that the defendant's claim is that the grantor himself signed it. It is apparent from a reading of the opinion of the full court in the case last above cited that it took that view of that case.

We think that if the opinion evidence in this case is sufficient to establish the fact that the signature attached to the deed in question is not the signature of T. K. Lalakea the Circuit Judge would be justified in finding that T. K. Lalakea never executed the deed. As said by Jones in his *Commentaries on Evidence*, Vol. 3, p. 597, "This kind of

testimony may be so weak as to be unsafe to act upon, or so strong as, in the mind of every [346] reasonable man, to produce conviction. But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule that, if one has seen the person write, he will be competent to speak as to such handwriting." The opinion evidence in this case is as strong and positive as opinion evidence could well be that the signature to the deed is not the signature of T. K. Lalakea and would justify the Circuit Judge in finding as a fact that the deed was not executed by T. K. Lalakea.

Our conclusion is that the plaintiff has produced substantial testimony tending to establish both that the deed in question was never delivered and that it was not executed by the alleged grantor. The Circuit Judge therefore committed no error in denying the motion for a nonsuit and the exception thereto must be and is overruled.

J. W. RUSSELL (J. LIGHTFOOT and RUSSELL & PATTERSON on the brief), for Plaintiff.

W. H. SMITH (W. S. WISE with him on the brief), for Defendant.

JAMES L. COKE.

S. B. KEMP.

JAS. J. BANKS.

[Indorsed]: No. 1257. Supreme Court, Territory of Hawaii. October Term, 1919. Hannah Makainai vs. Solomon K. Lalakea. Opinion. Filed

May 19, 1920, at 2:03 P. M. J. A. Thompson,
Clerk. [347]

[Title of Court and Cause.]

Decision on Exception.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed May 19, 1920, the exception is overruled.

Dated, Honolulu, T. H. May 21, 1920.

By the Court:

J. A. THOMPSON,
Clerk Supreme Court.

O. K.—KEMP.

[Indorsed]: No. 1257. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff, vs. Solomon Lalakea, Defendant. Decision on Exception. Filed May 21, 1920, at 3:00 P. M. J. A. Thompson, Clerk. [348]

[Title of Court and Cause.]

Notice of Decision on Exception.

To the Honorable CLEMENT K. QUINN, Judge of the Circuit Court of the Fourth Judicial Circuit of the Territory of Hawaii:

YOU WILL PLEASE TAKE NOTICE that in the above-entitled cause the Supreme Court has rendered the following decision on exception:

“DECISION ON EXCEPTION.

“In the above-entitled cause, pursuant to the opinion of the above-entitled court filed May 19, 1920, the exception is overruled.

“Dated, Honolulu, T. H., May 21, 1920.

“By the Court.

“J. A. THOMPSON,
“Clerk Supreme Court.”

Dated May 21, 1920.

By the Court.

[Seal] J. A. THOMPSON,
Clerk Supreme Court.

[Indorsed]: No. 1257. In the Supreme Court of the Territory of Hawaii. Hannah Makainai, Plaintiff, vs. Solomon Lalakea, Defendant. Notice of Decision on Exception. Filed May 21, 1920, at 3:00 P. M. J. A. Thompson, Clerk. [349]

No. 1345. In the Supreme Court of the Territory of Hawaii. October Term 1922. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Order Extending Time for Preparation and Transmission of Record. Rec'd and Filed in the Supreme Court April 9, 1923 at 11:45 o'clock A. M. Robert Parker, Jr., Deputy. Smith & Wild, Attorneys at Law, 210 McCandless Bldg., Honolulu, T. H. [350]

[Title of Court and Cause.]

Order Extending Time to and Including May 30, 1923, to File Record and Docket Cause.

Upon application of counsel for the plaintiff in error and just cause appearing therefor, and pur-

suant to Section 1 or Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit.

IT IS HEREBY ORDERED that the plaintiff in error, Solomon K. Lalakea, and the Clerk of this Court, be and they are hereby allowed until and including the 30th day of May, A. D. 1923, within which time to prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the records in the above-entitled cause on assignment of errors in this court, together with said assignment of error and all other papers required as a part of said record.

Dated at Honolulu, T. H., this 9th day of April, A. D. 1923.

E. C. PETERS,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Due April 27/23.

R. P., Jr.,
Dep. Clk. [351]

Consent to the allowance of the foregoing order is hereby given.

H. EDMONDSON,
Attorney for the Defendant in Error. [352]

No. 1345. In the Supreme Court of the Territory of Hawaii. October Term 1922. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Order for Transmission of Original Exhibits.

Recd. and Filed in the Supreme Court April 9, 1923, at 11:45 A. M. Robert Parker, Jr., Deputy Clerk. Smith & Wild, Attorneys at Law, 210 McCandless Bldg., Honolulu, T. H. [353]

[Title of Court and Cause.]

Order for Transmission of Original Exhibits.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii.

You are hereby authorized and directed in connection with the writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause to transmit as part of the record required by the praecipe of the plaintiff in error the following exhibits upon his counsel undertaking to return them to the files of this court and in the meantime substituting in this court in lieu thereof, at his own proper cost rectigraphic copies of the same, namely:

- (1) Plaintiff's Exhibit "B-1," certified copy of deed dated March 6, 1915, by T. K. Lalakea to Mrs. Jennie K. Aona, Mrs. Mohihio Hewahewa and Mrs. Hana Makainai, recorded in Liber 428, pp. 131, 132;
- (2) Plaintiff's Exhibit "C," being a lease dated March 20, 1915, between T. K. Lalakea and Hamada Kumadiro;
- (3) Defendant's Exhibit "A," for identification, a promissory note, dated November 7, 1906, signed by C. K. Maguire and T. K. Lalakea, payable to the First Bank of Hilo, Limited;

- (4) Defendant's Exhibit "B," for identification, a promissory note, dated June 4, 1909, signed by Samuel K. Pua, T. K. Lalakea and C. K. Maguire, said note being secured by the assignment of the salary of the Sheriff of the County of Hawaii for months of July, August and September, 1909, at the rate of \$200.00 per month; [354]
- (5) Defendant's Exhibit "C," for identification, being a lease dated January 15, 1915, between Solomon K. Lalakea and C. Ah Yen;
- (6) Defendant's Exhibit "D," for identification, being a lease dated January 27, 1911, between T. K. Lalakea and Lum Chun;
- (7) Defendant's Exhibit 2, a lease dated November 30, 1913, between T. K. Lalakea and Fugimoto Nonosaku;
- (8) Defendant's Exhibit 2, a sketch drawn in pencil on yellow paper;
- (9) Defendant's Exhibit 3, a lease dated August 5, 1907, between T. K. Lalakea and Tsuchishima Ikei;
- (10) Defendant's Exhibit 3, a letter dated January 27, 1915, by Solomon K. Lalakea to Dear Papa;
- (11) Defendant's Exhibit 4, an envelope postmarked—Honolulu— January 27, and addressed to "Mr. T. K. Lalakea, Hilo, Hawaii";

(12) Defendant's Exhibit 4, a lease dated April 6, 1905, between T. K. Lalakea and Joao Martina.

Dated at Honolulu, T. H., this 9th day of April, A. D. 1923.

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the within order is hereby admitted this 9th day of April, A. D. 1923.

H. EDMONDSON,

One of the Attorneys for Plaintiff-Deft. in Error.
[355]

No. 1345. In the Supreme Court of the Territory of Hawaii. October Term 1922. Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error. Undertaking to Return Original Exhibits. Rec'd and filed in the Supreme Court April 9, 1923, at 11:45 o'clock A. M. Robert Parker, Jr., Deputy Clerk. Smith & Wild, Attorneys at Law, 210 McCandless Bldg. Honolulu, T. H. [356]

Service of the within copy of undertaking to return orig. exh. is hereby admitted this 23d day of March, A. D. 19—.

H. EDMONDSON,

One of Attorneys for Defendant in Error.

[Title of Court and Cause.]

Undertaking to Return Original Exhibits.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii.

We hereby undertake to return to the files of the Supreme Court of the Territory of Hawaii the following original exhibits sent to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with the order of the Chief Justice of the Supreme Court of the Territory of Hawaii:

- (1) Plaintiff's Exhibit "B-1," certified copy of deed dated March 6, 1915, by T. K. Lalakea to Mrs. Jennie K. Aona, Mrs. Mohihio Hewahewa and Mrs. Hana Makainai, recorded in Liber 428, pp. 131, 132;
- (2) Plaintiff's Exhibit "C," being a lease dated March 20, 1915, between T. K. Lalakea and Hamada Kumadiro;
- (3) Defendant's Exhibit "A," for identification, a promissory note, dated November 7, 1906, signed by C. K. Maguire and T. K. Lalakea, payable to the First Bank of Hilo, Limited;
- (4) Defendant's Exhibit "B," for identification, a promissory note, dated June 4, 1909, signed by Samuel K. Pua, T. K. Lalakea and C. K. Maguire, said note being secured by the assignment of the salary of the Sheriff of the County of Hawaii, for the months of July, August and

September, 1909, at the rate of \$200.00 per month; [357]

- (5) Defendant's Exhibit "C," for identification, being a lease dated January 15, 1915, between Solomon K. Lalakea and C. Ah Yen;
- (6) Defendant's Exhibit "D," for identification, being a lease dated January 27, 1911, between T. K. Lalakea and Lum Chun;
- (7) Defendant's Exhibit 2, a lease dated November 30, 1913, between T. K. Lalakea and Fugimoto Nonosaku;
- (8) Defendant's Exhibit 2, a sketch drawn in pencil on yellow paper;
- (9) Defendant's Exhibit 3, a lease dated August 5, 1907, between T. K. Lalakea and Tsushima Ikei;
- (10) Defendant's Exhibit 3, a letter dated January 27, 1915, by Solomon K. Lalakea to Dear Papa;
- (11) Defendant's Exhibit 4, an envelope postmarked—Honolulu—January 27, and addressed to "Mr. T. K. Lalakea, Hilo, Hawaii";
- (12) Defendant's Exhibit 4, a lease dated April 6, 1905, between T. K. Lalakea and Joao Martina.

Dated at Honolulu, T. H., this 23d day of March,
A. D. 1923.

SMITH & WILD,

CARL S. CARLSMITH,

Per U. E. W.,

W. H. SMITH,

Per U. E. W.,

Attorneys for Plaintiff in Error. [358]

[Title of Court and Cause.]

**Certificate of Clerk to Transcript of Record and
Return to Writ of Error.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in pursuance to the within writ of error, the original whereof is herewith returned, being pages 299 to 301, both inclusive, of the foregoing transcript of record, and in pursuance to the praecipe filed on behalf of the defendant-plaintiff in error to me directed, a copy whereof is hereto attached, being pages 307 to 310, both inclusive, DO TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 292, both inclusive, pages 305 to 306, both inclusive, pages 317 to 330, both inclusive, pages 333 to 334, both inclusive, and pages 356 to 358, both inclusive, AND I CERTIFY the same to be full, true and correct copies of the plead-

ings, record, entries, exhibits, opinions and final judgment, which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in the cause entitled in said court, "Hannah Makainai, Plaintiff-Defendant in Error, vs. Solomon K. Lalakea, Defendant-Plaintiff in Error, [359] and Numbered 1345.

I DO FURTHER CERTIFY that the original assignment of errors, filed February 6, 1923, being pages 293 to 298, both inclusive, the original citation on writ of error, filed February 6, 1923, with admission of service of copy thereof by Messrs. H. Edmondson and J. Lightfoot, attorneys for the plaintiff-defendant in error, being pages 302 to 304, both inclusive, the original order filed February 19, 1923, extending time until April 27, 1923, for the preparation and transmission of record, being pages 311 to 313, both inclusive, and the original order filed April 9, 1923, extending time until May 30, 1923, for the preparation and transmission of record, being pages 350 to 352, both inclusive of the foregoing transcript of record are herewith returned.

I FURTHER CERTIFY that pursuant to orders herein filed copies whereof are hereto attached, being pages 331 to 332, both inclusive, and pages 353 to 355, both inclusive, I DO TRANSMIT herewith as part of the record in the foregoing entitled cause, the following original exhibits, viz.:

- (1) Plaintiff's Exhibit "B-1," certified copy of deed dated March 6, 1915, by T. K. Lalakea to Mrs. Jennie K. Aona, Mrs. Mohi-

hio Hewahewa and Mrs. Hana Makainai, recorded in Liber 428, pp. 131, 132;

- (2) Plaintiff's Exhibit "C," being a lease dated March 20, 1915, between T. K. Lalakea and Hamada Kumadiro;
- (3) Defendant's Exhibit "A," for identification, a promissory note, dated November 7, 1906, signed by C. K. Maguire and T. K. Lalakea, payable to the First Bank of Hilo, Limited;
- (4) Defendant's Exhibit "B," for identification, a promissory note, dated June 4, 1909, signed by Samuel K. Pua, T. K. Lalakea and C. K. Maguire, said note being secured by the assignment of the salary of the Sheriff of the County of Hawaii for the months of July, August and September, 1909, at the rate of \$200.00 per month;
- (5) Defendant's Exhibit "C," for identification, being a lease dated January 15, 1915, between Solomon K. Lalakea, and C. Ah Yen;
- (6) Defendant's Exhibit "D," for identification, being a lease dated January 27, 1911, between T. K. Lalakea and Lum Chun;
- (7) Defendant's Exhibit 2, a lease dated November 30, 1913, between T. K. Lalakea and Fugimoto Nonosaku; [360]
- (8) Defendant's Exhibit 2, a sketch drawn in pencil on yellow paper;

- (9) Defendant's Exhibit 3, a lease dated August 5, 1907, between T. K. Lalakea and Tsushima Ikei;
- (10) Defendant's Exhibit 3, a letter dated January 27, 1915, by Solomon K. Lalakea to Dear Papa;
- (11) Defendant's Exhibit 4, an envelope post-marked—Honolulu, January 27, and addressed "Mr. T. K. Lalakea, Hilo, Hawaii";
- (12) Defendant's Exhibit 4, a lease dated April 6, 1915, between T. K. Lalakea and Joao Martina, and
- (13) An account-book with canvas cover, referred to in the proceedings and in the transcript of testimony under date of September 1, 1920, and designated in the praecipe for transcript of record filed on behalf of the plaintiff-defendant in error as Plaintiff's Exhibit "I" (Item 1a).

I FURTHER CERTIFY that in pursuance to the praecipe filed on behalf of the plaintiff-defendant in error, to me directed, a copy whereof is hereto attached, being pages 314 to 316, both inclusive, I DO TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit as part of the foregoing transcript of record pages 335 to 349, both inclusive, AND I CERTIFY the same to be full, true and correct copies of each of the originals thereof which are now on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii

in a cause entitled in said court "Hannah Makai-nai, Plaintiff, vs. Solomon K. Lalakea, Defendant," and Numbered 1257.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$214.40, and that the said amount has been paid by Solomon K. Lalakea, the defendant-plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 30th day of April, A. D. 1923.

[Seal] JAMES A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii. [361]

[Endorsed]: No. 4034. United States Circuit Court of Appeals for the Ninth Circuit. Solomon K. Lalakea, Plaintiff in Error, vs. Hannah Makai-nai, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed May 17, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Plaintiff's Exhibit "I" Item No. (1a).

1915. March

March, 1915.

1 S. Kosuma,

Rent Front St. to March 1/5..... 50 00

" Taki Watada

Waiakea Mtg. & Int. 1%....600

" Mrs. Tapahu

Rent room Front St. Feb..... 2 00

571 40

3 J. K. Kekaula (acc.

Mortgage 1 yr. at 1%.....500 00

Salary Feb. 1915..... 90 00

S. P. 156.

Hap Kee Poi

" Rent Waiakea Oct. to March 1. 52 50

By cash 27 00

" Poi 5 mo..... 25 50

W. A. Todd

part Rent Bridge St. Dec.)

Jan. Feb. \$24.00)24 00 8 00

10 Siochika

Rent Mokuhonua 1/2 mo. 6 mo.

July 26/15 8 75

" Kawakawi

Rent Mokuhonua 1/2 mo. to July

26/15 8 75

S. P. p. 50

11 J. K. Kekaula (acc.

Paid salary check 451 of..

Feb/15 9 00

“ Sakamoto	
Rent Front St. to April 1/15..	25 00
S. P. 112.	
13 Minawai Sai	
Rent Kauhiula to Aug. 21/15..	23 75
Alika	
“ Geo. (Hussey)	
Part Rent Waipio Estate)	
Moakeawe year)	20 00
March.	
13 C. W. Brickwood	
Apr. note check 2229.....	25 00
19 Kawamura Magochichi	
Rent Kaiwiki 6 mo. Mar. 10	11 00
to Sept 10, 1915.	
“ D. Keawehano	
On a/c of Int.	139 00
Paid Int.	
S. P. 143.	
20 Muranaka Emo.	
Rent Kaiwiki Lot #14.....	8 25
6 mo. Mar. 18 to Sept. 20/15.	
“ Hamada Kumadiro	
Rent Kaiwiki Lot 14.....	8 25
6 mo. Mar. 20 to Oct. 20/15.	
24 Mrs. W. A. Todd	
On a/c mrtg. land Pleasant St..	20 00
27 Mrs. Kaaha	
To cash (Kahue)	5 00
Apr. 9 Henry Kalohiki	
mortg. & note	45 00

“ 10	George Tucker Part Rent House Bridge St. to May 1/15.	14 00
“ 12	Sakamoto Rent Front St. to May 1, 1915.	25 00
“ 5	John Masuhashi Rent collected.	99 65
“ “	Kealo Hanohano Rent collected.	25 25
Puue		
Apr. 13	Otto Rose Rent Bridge St. Mar. 1 to Apr. 1/15	10 00
“ 13	Mrs. George Tucker and Kapena Hoe 1 yr 9 da note.	51 50
“ 17	Brickwood a/c of note	25 00
“ “	Daisy C. Aiona Part Rent Front St. from Mar. 1 to Apr. 1, 1915.	50 00
“ “	F. Eguchi Rent Kaiwiki Lot #23 Dec. 1 to June 1/15.	30 50
“ 20	Mrs. W. A. Todd Mortg. of note	20 00
“ 23	Kozuma Rent House Front St. to May 1, 1915.	50 00

“ 28	Nishimura	Rent Mokuhonua to Oct. 2, 1915.	23 00
May 6	Shimanura Haruziro	R Mokuhonua to Oct. 16/15.	30 00
“ 17	Ah Young	Part	
	Rent Front St from Apr. 1 to May 1, 1915.		13 00
“ 15	Tax on Property		
	Paid for 6 mo.....		224 55
“ 19	Mrs. W. A. Todd		
	Mortg. & note		20 00
May 19	S. Kozuma		
	Rent Front St. to June 1, 1915.		50 00

[Endorsements]:

Law No. 679. Received in Evidence June 23, 1920, and Marked Plff.'s Exhibit "I." Thomas Pedro, Jr., Clerk.

P. No. 234. Received in Evidence Sept. 3, 1920, and Marked Geo. Lalakea et al. Exhibit "W." Irma Patten, Clerk.

No. 1329. Recd. and filed in the Supreme Court May 28, 1921, at 11:15 A. M. J. A. Thompson, Clerk.

L. No. 875. Received in Evidence, Jan. 17, 1922, and Marked Defts. Exhibit "2." Bernard H. Kelikolio, Asst. Clerk.

No. 4034. United States Circuit Court of Appeals for the Ninth Circuit. Filed May 17, 1923. F. D. Monckton, Clerk. Plff.'s Exhibit "I."

United States Circuit Court of Appeals for the
Ninth Circuit.

WRIT OF ERROR.

SOLOMON K. LALAKEA,

Defendant-Plaintiff in Error,

vs.

HANNAH MAKAINAI,

Plaintiff-Defendant in Error.

**Notice of Forwarding of Record on Writ of Error
and Designation of Parts of Record to be
Printed.**

To Hannah Makainai, Plaintiff-Defendant in Error Herein, and to H. Edmondson and J. Lightfoot, Her Attorneys.

Please take notice that the record on writ of error in the above cause was forwarded by the Clerk of the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit on Friday, the 4th day of May, A. D. 1923, and in the ordinary course of mail should be filed in the records of said court not later than the 14th day of May, A. D. 1923.

You are further notified that plaintiff in error intends to rely upon all the assignments of error in said record and considers all of said record necessary for the consideration of his said assignments of error, with the exception of the following which plaintiff in error does not consider neces-

sary to be printed in said record and desires to have omitted from said record as printed:

1. Order for transmission of original exhibit filed March 21, 1923, on behalf of plaintiff-defendant in error;
2. Undertaking by counsel for the plaintiff-defendant in error to return original exhibit filed March 21, 1923;
3. Praeceptum for transcript of record, filed on behalf of the plaintiff-defendant in error, dated February 28, 1923;
4. Exhibit number 13, being an account-book with canvas cover referred to in the proceedings and in the transcript of testimony under date of September 1, 1920, and designated in the praecipe for transcript of record filed on behalf of plaintiff-defendant in error, as Plaintiff's Exhibit "I," Item Number (1a);
5. Title of Court and Cause, except on first page and in the complaint, inserting instead the words "Title of Court and Cause."

Dated at Honolulu, T. H., this 7th day of May,
A. D. 1923.

SOLOMON K. LALAKEA,
Defendant-Plaintiff in Error.
By W. H. SMITH,

Per U. E. W.,
CARL S. CARLSMITH,
Per U. E. W.,
ARTHUR G. SMITH,
Per U. E. W.,
U. E. WILD,
His Attorneys.

Due service of a copy of the foregoing is admitted this 7th day of May, A. D. 1923.

J. LIGHTFOOT,

H. EDMONDSON,

Attorneys for Plaintiff-Defendant in Error.

[Endorsed]: 4034. United States Circuit Court of Appeals for the Ninth Circuit. Solomon K. Lalakea, Defendant-Plaintiff in Error, vs. Hannah Makainai, Plaintiff-Defendant in Error. Notice of Forwarding of Record on Writ of Error and Designation of Parts of Record to be Printed. Filed May 17, 1923. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

WRIT OF ERROR.

SOLOMON K. LALAKEA,

Defendant-Plaintiff in Error,

vs.

HANNAH MAKAINAI,

Plaintiff-Defendant in Error.

Notice Designating Parts of Record to be Printed.

To the Clerk of the Above-entitled Court, and to Solomon K. Lalakea, Defendant-Plaintiff in Error, and to Messrs. Carl S. Carlsmith, W. H. Smith, A. G. Smith and U. E. Wild, His Attorneys:

Please take notice that Hannah Makainai, plaintiff-defendant in error above named, hereby design-

nates additional parts of the record herein which she thinks material and which she requires to be printed as part of the record upon the hearing of the writ of error by the above-entitled court:

1. Order for transmission of original exhibit filed March 21, 1923, on behalf of plaintiff-defendant in error;
2. Undertaking by counsel for the plaintiff-defendant in error, to return original exhibit filed March 21, 1923;
3. Praecipe for transcript of record, filed on behalf of the plaintiff-defendant in error, dated February 28, 1923;
4. Pages 150 to 153, inclusive, of exhibit numbered 13, being an account-book with canvas cover referred to in the proceedings and in the transcript of testimony under date of September 1, 1920, and designated in the praecipe for transcript of record filed on behalf of plaintiff-defendant in error, as Plaintiff's Exhibit "I," Item Number (1a).

Dated, Honolulu, T. H., this 8th day of May, 1923.

HANNAH MAKAINAI,
Plaintiff-Defendant in Error.

By J. LIGHTFOOT,
H. EDMONDSON,

Her Attorneys.

Due service of a copy of the foregoing is admitted this 10th day of May, 1923.

CARL S. CARLSMITH,
W. H. SMITH,
ARTHUR A. SMITH,
U. E. WILD,

Attorneys for Solomon K. Lalakea, Defendant-
Plaintiff in Error.

[Endorsed]: No. 4034. United States Circuit Court of Appeals for the Ninth Circuit. Solomon K. Lalakea, Defendant-Plaintiff in Error, vs. Hannah Makainai, Plaintiff-Defendant in Error. Notice Designating Parts of Record to be Printed. Filed May 18, 1923. F. D. Monckton, Clerk.

No. 4034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOLOMON K. LALAKEA,
Plaintiff in Error

v.

HANNAH MAKAINAI,
Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the Supreme Court of the
Territory of Hawaii.

J. LIGHTFOOT,
H. EDMONDSON,
Attorneys for Defendant in Error.

FILED this..... day of....., 1923.

F. D. MONCKTON, *Clerk.*

By.....
Deputy Clerk.



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No. 4034

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOLOMON K. LALAKEA,
Plaintiff in Error

v.

HANNAH MAKAINAI,
Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

Upon Writ of Error from the Supreme Court of the
Territory of Hawaii.

STATEMENT BY COUNSEL.

Counsel for Plaintiff in Error have not served a copy of their brief on us up to the time of writing this brief in Honolulu. One of opposing Counsel contended that under the Rule (24) they are not obliged to serve us till twenty days before October 25th, when the case is set for argument. Owing to the uncertainty of the sailing of steamers at the present time, which come here from Japan and thence go to San Francisco, this brief must be dispatched by a Matson

steamer leaving Honolulu on October 10th. The printer here says he will require four clear working days to print our brief. Omitting Sunday, October 7th, it means the printer must have the brief Friday morning, October 5th, at the latest.

It will be impracticable to attempt to answer Plaintiff in Error's brief if not served on us until October 4th. We, therefore, ask the Court's indulgence for making a statement of the case including the evidence, and for covering all the assignments of error irrespective of whether they are argued in Plaintiff in Error's brief.

Should Plaintiff in Error raise any point not covered by our brief, we shall ask leave to file a supplemental brief.

THE CASE.

This is an action in ejectment by Hannah Makainai, the Defendant in Error above named, as Plaintiff, against her brother, Solomon K. Lalakea, Plaintiff in Error above named, as Defendant, to recover from him the lands described in the amended complaint and damages for their retention. (R9-15.) For brevity we will refer to Plaintiff in Error as "Defendant," and to Defendant in Error as "Plaintiff." Defendant answered by general denial, and the action was tried jury waived. At the close of Plaintiff's evidence, defendant moved for a non-suit, which was overruled. Defendant took an interlocutory bill of exceptions

from this ruling to the Supreme Court of the Territory; the exceptions were overruled; and after further trial judgment was rendered for plaintiff. The case again went to the Supreme Court on writ of error, and the judgment of the trial court was affirmed. The case is before this Court on writ of error to the Supreme Court of the Territory.

At the beginning of the trial evidence was introduced by stipulation between the parties in open court as to certain facts which were stated by the Attorney for the Defendant substantially as follows:

That T. K. Lalakea mentioned in the declaration was, in his life time and prior to the execution or alleged execution, or prior to the date of a certain deed dated March 6, 1915, which would be offered in evidence by the defense, seized of the lands mentioned in the declaration; that T. K. Lalakea died intestate on May 7, 1915; and that Plaintiff was an heir at law of T. K. Lalakea, deceased. These stipulations were subject to an agreement by Counsel for Plaintiff that Defendant might offer in evidence, and there would be no objection to accepting in evidence, the deed above referred to, which was recorded in the Registry of Conveyances in Honolulu on May 11, 1915, and that the deed should be considered as constituting a *prima facie* case upon the part of the Defendant. Plaintiff's Counsel added the further stipulation that Defendant was in possession of the lands, which Defendant's attorney agreed to. With these stipulations Plaintiff

rested; and with the introduction in evidence of the deed referred to, Defendant also rested. (R. 131-134.)

T. K. Lalakea was the father of both plaintiff and defendant and also had other children.

The deed purported to have been signed by T. K. Lalakea and witnessed by D. Namahoe and Solomon K. Lalakea, the Defendant. (R343-351.) It was not acknowledged by T. K. Lalakea in his life time, but the day after his death, the subscribing witnesses appeared before the Circuit Judge in Hilo, produced the deed, and, according to the Judge's certificate attached to or endorsed upon the deed, the witnesses were "satisfactorily proved to me to be the same persons whose names are subscribed to the within instrument as witnesses thereto, by the oath of W. S. Wise, a credible witness for that purpose, who being by me duly sworn, did severally depose and say that they . . . both were present and saw T. K. Lalakea, who was personally known to each of them, to be the same person described in and who executed the annexed instrument, freely and voluntarily sign, seal and deliver the same," (R350-351.)

Plaintiff then introduced rebuttal evidence for the purpose of showing that the signature on the deed was not in fact the signature of T. K. Lalakea and that the deed was never delivered. It was further stipulated that if Plaintiff was entitled to recover, she was entitled to an undivided one-eighth interest in the lands in question. (R135-221.)

T. K. Lalakea consulted his attorney, Mr. Shipman, relative to the disposition of his property, on several occasions, and finally Mr. Shipman prepared and delivered to T. K. Lalakea in December, 1914, about half a dozen different deeds, one of which was the deed in question. (Defendant's Exhibit "1.") Two of the other deeds were to some of T. K. Lalakea's other children. See Plaintiff's exhibits "A" and "B." (R335-343.) At that time the deeds were not dated or signed. (R-136-138.)

Mr. Shipman was T. K. Lalakea's legal advisor for about four years prior to his death. Mr. Shipman was also a notary public and T. K. Lalakea habitually went to Mr. Shipman to have his conveyancing done and acknowledgements taken (R135-136). The last time Mr. Shipman took T. K. Lalakea's acknowledgment prior to March 6, 1915, was January 25, 1915 (the reference "1912" on page 154 of the record is a copyist error for "1915," as shown by the stipulation of counsel filed in this Court), and the last time of all was March 30, 1915. (R154.)

Mr. Shipman had several conversations with T. K. Lalakea after handing the deeds to him relative to signing them. The first was in December, 1914, at the time the deeds were handed to T. K. Lalakea. There was another on January 30, 1915; another on March 6, 1915 (about four hours after the deeds were supposed to have been signed); another on March 20, 1915, and the last in April, 1915. In all there were

four or five conversations at different times. (R142-144.) Mr. Shipman was not permitted to say what the conversations were, but it can be inferred from the record that on the day T. K. Lalakea died, Mr. Shipman did not know that T. K. Lalakea had signed the deeds (R146-151). None of the deeds were ever executed or acknowledged in Mr. Shipman's presence. (R144-145.)

The deed to the Plaintiff and others (Plaintiff's Exhibit "B") was never delivered to her or her sister, Mrs. Hewahewa, one of the other grantees therein named, during T. K. Lalakea's lifetime. About two years after T. K. Lalakea's death Defendant gave Plaintiff a *certified copy* of this deed (retaining the original with T. K. Lalakea's alleged signature on it), which was marked Exhibit "B-1" (R168, 185, 186).

Mr. Shipman said that about ten minutes before he heard of T. K. Lalakea's death, Defendant came to his office in a greaty hurry "in a big fuss and wanted me to come right away to Lalakea's residence, stating that he was in *pilikia*, in a bad way, and wanted me to go over right away and go over to see about these deeds, these half a dozen deeds that I had originally drafted and delivered to T. K. Lalakea. I asked him if Mr. Lalakea was conscious, to know what he was doing. He did not think he was. Solomon did not think he was really conscious. I said, 'It is no use for me to go, I couldn't do anything for you; it is too late.' On that Solomon went out . . ." (R146-147.) Mr.

Shipman was unable to say whether Defendant stated that he wanted to have T. K. Lalakea sign and take his acknowledgment or simply to take his acknowledgment. (R147-151.)

Plaintiff and her sister testified that they were living in the same house with T. K. Lalakea when he died; that within an hour after he died, when Plaintiff and her sister were present, Defendant came to the house, went to a bureau in T. K. Lalakea's bedroom where T. K. Lalakea kept his private papers and money locked up, unlocked the bureau and took out a bundle of papers that resembled the deeds, three of which were exhibits in the case, wrapped them in a towel and left the house.

For a short time prior to T. K. Lalakea's death, Defendant had been looking after his father's business and had sometimes had the key to the bureau to obtain access to his father's papers. (R160-166, 182-184.)

Three witnesses, including Mr. Shipman, who knew T. K. Lalakea well for a number of years before his death, and who were familiar with his signature, testified as positively as any witnesses could, who gave their opinions, that the signature to Defendant's deed (Defendant's Exhibit "1") was not the signature of T. K. Lalakea. (R152-153, 155-157, 199-215, 217-221.)

Defendant's Counsel, Mr. Smith, subjected these witnesses to a thorough cross-examination, he introduced a number of genuine signatures of T. K. Lala-

kea for comparison with that on Defendant's deed, had some of the witnesses analyze the formation of letters composing the signature on the deed, and during his cross-examination of one of these witnesses, Mr. Smith was asked:

The Court.—“Are you willing to admit that the signature on Exhibit “I” is the signature of T. K. Lalakea?”

Mr. Smith.—“I suppose it is.” (R204.)

Mr. Wise, who was also of Counsel for Defendant, and present at the trial, took part in proving the deed immediately after T. K. Lalakea's death (350-351), and therefore must have known the actual facts in connection with the signature.

The trial judge in his decision said,

“At the time of the above mentioned ‘several admitted genuine signatures of T. K. Lalakea’ W. H. Smith, counsel for Solomon Lalakea, informed the Court *that he would swamp the Court when the defence put on its case with other genuine signatures of T. K. Lalakea*, signatures, made by T. K. Lalakea while he was Treasurer of the County of Hawaii *and thereby prove to the Court that the signature to the deed of March 6, 1915, was and is the genuine signature of T. K. Lalakea.*” (R 34.)

On March 20, 1915, T. K. Lalakea made a lease, (Plaintiff's Exhibit “C”), which he signed and acknowledged before Mr. Shipman, to Hamada Kumadiro, for a term of ten years, covering some of the land comprised in Defendant's deed. (R215-217.)

At the conclusion of this evidence, Defendant moved for a non-suit on the following grounds:

I. "That the plaintiff has not presented any evidence herein in support of her declaration.

II. That the Plaintiff has not introduced evidence sufficient to entitle her to a judgment by this Court in her favor.

III. That the Plaintiff has failed to sustain all the necessary allegations in her declaration." (R. 222.)

The Court ruled upon this motion as follows:

"The Court having gone over the authorities cited by defendant in support of the motion for a nonsuit and having no doubt in the mind of the Court that the testimony introduced by plaintiff is and would be sufficient for the Court to allow it to proceed to the jury under proper instructions, but this being jury waived the court is of the opinion that the authorities cited in support of the contention on the motion for a nonsuit merely gives weight to the evidence, it is therefore ordered that the motion for a nonsuit is overruled."

Defendant excepted and was allowed an interlocutory bill of exceptions to the Supreme Court. (R222-223, 355-357.)

The Supreme Court in overruling the exceptions, (R358-369) said:

"We are then called upon to determine whether the testimony in this case does more than create mere surmise or suspicion that T. K. Lalakea never delivered the deed in question to the Defendant. We think that it does. It shows clearly that within a few minutes of the death of his father the defendant was seeking the aid of an

attorney and notary public to have the deed acknowledged by his father; that within a very short time after his father's death he went into the room occupied by his father prior to his death and took therefrom papers which it might be inferred included the deed in question; it also shows that several other deeds were made by the same grantor at the same time, under the same circumstances, conveying other property to the defendant's brothers and sisters and that these deeds, or at least some of them, were never delivered. The evidence as to the genuineness of the grantor's signature is not without bearing upon this issue. If as might be found from the evidence of the three witnesses to which we have referred the deed was never executed by T. K. Lalakea this fact would have a strong bearing upon the question of the delivery or nondelivery of the deed." (R. 367.)

The Supreme Court goes on to discuss the opinion evidenced as to the signature and concluded:

"The opinion evidence in this case is as strong and positive as opinion evidence could well be that the signature to the deed is not the signature of T. K. Lalakea and would justify the Circuit Judge in finding as a fact that the deed was not executed by T. K. Lalakea.

"Our conclusion is that the plaintiff has produced substantial testimony tending to establish both that the deed in question was never delivered and that it was not executed by the alleged grantor." (R. 369.)

At the further trial the defense introduced two witnesses, Namahoe and defendant; but did not offer any evidence to prove the signature on the deed was T. K. Lalakea's as previously contended; they offered

an inconsistent defense, viz., that the signature was made by defendant guiding T. K. Lalakea's hand.

Namahoe testified that he was 60 years old and had been on intimate terms with T. K. Lalakea for 20 years; that some time in March, 1915, between eleven and twelve o'clock in the day time, when he was at work in the market at Hilo, he was called by defendant to go to T. K. Lalakea's house; that he went to the house and when he got there T. K. Lalakea and Defendant were the only people he saw about the house; that T. K. Lalakea was seated at the head of the table in the dining room with some documents before him that he said were partition deeds to the family. (R235-239.) That he saw the signature "T. K. Lalakea," written on Defendant's deed (Defendant's Exhibit "1"); that T. K. Lalakea was weak and sick and unable to write and asked the Defendant to assist him, which he did; that Defendant assisted in making the other signatures on the other deeds, and that after the deeds had been signed in this manner, T. K. Lalakea requested Namahoe and the Defendant to write their names on the deeds as witnesses, which they did. (R240-242.) That after the documents had been signed and witnessed, T. K. Lalakea "gave the papers over to his son and told him to take very good care of them and if he should die to have them acknowledged." (R243.) Later the witness restated this in the following words: "At that time after the signing of our names he (T. K. Lalakea) gave all these papers

to Solomon and told him to 'take care of these papers, if I should pass take these papers, have them probated and give each its share.' " (R252.)

The witness testified in Hawaiian through an interpreter. The word interpreted into "probated" was "Hooiaio", it also means "acknowledged." (R252.)

On cross-examination Namahoe said that he called at T. K. Lalakea's house nearly every day, but sometimes when he was busy with his work, he did not visit. That Namahoe was never asked before March 6, 1915, or afterwards to sign any documents for T. K. Lalakea. (R244-246.)

The Defendant testified that he was 33 years old. In January, 1915, he was a postoffice clerk in Honolulu, but, at his father's request, he returned to Hilo about the end of January to look after his father's business, which consisted of collecting rents, notes and mortgages. (R253-257.) When Defendant reached home from Honolulu the deeds (which Mr. Shipman had prepared) were in the house. (R258.) Defendant went to fetch Namahoe at the request of T. K. Lalakea, and at that time the deeds were in the bureau where T. K. Lalakea kept his money locked up. (R263.) When Namahoe arrived, T. K. Lalakea said, that the purpose of the deeds was to separate all his estate and divide it among his different children' (R263.) When T. K. Lalakea started to write he was shaky and not able to write. We quote the record:

Q. "What did he say?"

A. "He wanted me to come and hold his hand so that he could write his name."

Q. "What did you do?"

A. "I did as he requested me to do."

Q. "Did you do that with one deed or all the deeds?"

A. "All the deeds."

Q. "After the deeds were signed and witnessed by you two what did you do with the deeds?"

A. "Pass over to me, told me——"

Q. "What did he tell you?"

A. "Told me to hold the deeds."

Q. "What else did he say?"

A. "He said to hold the deeds until he pass away and then to have them acknowledged."
(R. 264.)

T. K. Lalakea did not say anything else. (R265.)

The date, March 6, 1915, was written in Exhibit "1" prior to Namahoe's arrival. Up to that time (March 6, 1915) T. K. Lalakea had kept the deeds in the bureau. (R265-267.) After T. K. Lalakea gave the deeds to Defendant, Defendant put them in a document box and put the document box inside a shoe box, which he put on the shelf in the dining room, where they stayed until T. K. Lalakea died. (R267.)

Immediately before T. K. Lalakea died, he told Defendant to carry out his instructions about the deeds and having them acknowledged (R268-269), and that Defendant went to Mr. Shipman's office to get him to take T. K. Lalakea's acknowledgment to the deeds. That Mr. Shipman told Defendant to go for the papers and Defendant returned to the house, that his

father had died in the meantime, and he took the papers from the *shelf* where he had put them on March 6, wrapped them in a cloth and returned to Mr. Shipman's office, but Mr. Shipman had left; that Defendant then took the deeds to Judge Wise, and the next day they proved them for record before the Circuit Judge. (R269-274.)

On cross-examination Defendant said he drew the lease, Plaintiff's Exhibit "C," which was signed by T. K. Lalakea on March 20, 1915. T. K. Lalakea was feeling much better that day and signed it without assistance. (R277.) On March 20, 1915, Defendant discussed the lease with T. K. Lalakea and there was nothing said about the lease covering property described in Defendant's Exhibit "1," although the lease did, in fact, cover part of that property. Mr. Shipman took the acknowledgment to the lease on the same day. (R277-278.)

Defendant did not know on March 6, 1915, that the deeds could be acknowledged before a Judge after T. K. Lalakea's death; the first time he found this out was when he went to Judge Wise's office immediately after T. K. Lalakea's death (R279.) Defendant did not delay more than two months after they were signed to get Mr. Shipman's acknowledgment to the deeds, as he acted upon instructions from T. K. Lalakea (R278.) Defendant did not know whether the deeds were valid or not before they were acknowledged (R279), and did not know whether it was "void" to

take the acknowledgment of an unconscious person. (R280.)

That Defendant did not say anything to his sisters, the Plaintiff and Mrs. Hewahewa, nor to his brother, nor to Mr. Shipman, about the deeds having been executed until his father was unconscious or dead. Defendant knew the matter was of great importance to everybody, but he did not say anything about the deeds because he considered they were of no benefit until T. K. Lalakea's death. (R281-284, 287.)

That Defendant had taken a course in business and commercial law at school and that he was the only one in the family that had a good education. (R287-288.)

That T. K. Lalakea after his wife's death (in August, 1914) had called his family together and discussed with them the disposition of his property after his death. (R289.) Defendant could give no reason why T. K. Lalakea should on March 6th be so shrewd in disposing of nearly all the property to Defendant when T. K. Lalakea had already asked the idea of his other children and wanted them all to be satisfied. The matter was not mentioned to the other members of the family and Defendant did not mention it to them. (R289-290.)

The Court of his own motion, for the purpose of taking such evidence as he felt necessary, covering some questions of fact, the Court was in doubt about, recalled Mr. Shipman (R291) and he fixed the time and day on March 6, 1915, when he visited T. K.

Lalakea. Mr. Shipman talked with Mr. T. K. Lalakea and collected some money from him; he was able to walk and did walk; he was in a normal condition, able to do business and did do business; he complained that his feet were swollen, but outside of that he was normal, his hands were in the same condition at that time that they were before and were "no shakier than what his condition had been" (R292-295). The Court called Mr. Shipman's attention to the lease dated March 20, 1915, Plaintiff's Exhibit "C"; Mr. Shipman said he took T. K. Lalakea's acknowledgment, and saw him write his signature, and that T. K. Lalakea appeared to be in the same condition on March 20, 1915, as on March 6, 1915, and did not need any assistance in making his signature on the lease. (R296-297.)

The Court then called Mr. Shipman's attention to an account book kept by T. K. Lalakea marked "Plaintiff's Exhibit "I" and referred to pages 150 to 153. (See R383-386), and asked Mr. Shipman if he could pick out the handwriting of T. K. Lalakea, to which he replied he could. Then follows on pages 298 to 300 of the record, a statement of what Mr. Shipman said were in the handwriting of T. K. Lalakea, which shows that on March 1, 3, 10 and several other dates down to March 27, 1915, there were entries in the handwriting of T. K. Lalakea. The Court asked Counsel if they had any questions to ask the witness and they said they had none. (R300.)

ERRORS ASSIGNED.

Assignments of Error numbered 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 (R2-5) raise three principal questions as follows:

1. Was the deed in question a forgery?
2. Was the deed delivered?
3. Did the trial court err in overruling Defendant's motion for continuance on June 28, 1920?

The second question is dependent on the first, because delivery of an instrument, being the final expression of an intention that the instrument shall take effect, presupposes the existence of the execution of the document. It is not logical to suppose that a forged deed, which is absolutely void, was ever delivered. The essential factor of intent that the instrument should operate and take effect is missing.

These questions will be dealt with in the order stated above, and the remaining assignments of error which raise minor questions, will be dealt with at the end of our brief.

ARGUMENT.

FORGERY.

This is entirely a question of fact. The trial court found that T. K. Lalakea at no time executed the deed in question and that it was a forgery. (R-38-50.)

The certificate of the Circuit Judge to the deed put in evidence by Defendant (Defendant's Exhibit "1")

shows that the day after T. K. Lalakea died Daniel Namahoe and the Defendant, in the presence of Mr. W. S. Wise, one of their Counsel at the trial in the present suit, swore that they, Namahoe and the Defendant, were present and saw T. K. Lalakea freely and voluntarily sign, seal and deliver the deed. (R350-351.)

Plaintiff and her witnesses had never seen any of the original deeds before the trial, the deeds being in possession of the Defendant. (R134, 138-142, 170-171, 185.) Three of the deeds purporting to have been signed by T. K. Lalakea were put in evidence and marked Defendant's Exhibit "1" and Plaintiff's Exhibit "A" and "B." (See R335-351.)

Mr. Shipman and two other reputable witnesses for the Plaintiff, one being a manager of a bank where T. K. Lalakea had done business and the other a manager of a trust company, who were familiar with T. K. Lalakea's signature, said that in their opinion the signature on the deed in question was not in the handwriting of T. K. Lalakea. (R199-221.)

Defendant's Counsel, Mr. Smith, cross-examined Plaintiff's witnesses in such a way as to leave no doubt that the defense was, that the signature on the deed in question was T. K. Lalakea's signature in his own handwriting. The Court and Plaintiff's Counsel asked Mr. Smith during his cross-examination if the signature on the deed was the signature of T. K. Lalakea and Mr. Smith replied, "I suppose it is." (R204.)

Then further we have the statement of the Trial Judge in his decision that during this cross-examination Mr. Smith informed the Court that when the defense put on its case he would swamp the court with other genuine signatures of T. K. Lalakea and thereby prove that the signature to the deed was his genuine signature. (R34.) In the briefs in the Court below it was denied that Mr. Smith made any such statement on the ground that the record did not show it, but surely the trial court's decision is part of the record, and if the decision was in error in this particular, Counsel should have taken steps in the trial court to have the decision corrected.

The writer of this brief was not present at the trial and consequently has no personal knowledge of what Mr. Smith said, but whether Mr. Smith made such a statement or not, would not and could not have altered the Court's final conclusion and findings that the deed was a forgery. It is abundantly clear from Mr. Smith's cross-examination of Plaintiff's handwriting witnesses that Mr. Smith left no stone unturned to discredit them. It can hardly be supposed that if the signatures were made in the manner ultimately contended by the defense, that Mr. Smith would have gone to all this trouble, and he certainly would not have taken an interlocutory bill of exceptions to the Supreme Court.

When the defense put on their witnesses instead of "swamping" the court with signatures of T. K. Lala-

kea and proving that the signature on the deed was in fact T. K. Lalakea's writing, the defense was that the signature was made by the Defendant guiding T. K. Lalakea's hand at his request.

Throughout the previous trial up to the time of Defendant's motion for a non-suit, when the Plaintiff had introduced all her evidence, and throughout the appeal to the Supreme Court of the Territory on interlocutory exceptions, not a word was said about the defense ultimately put forward at the further trial after the case had been remanded. The attitude of the defense in the trial court and in the Supreme Court on exceptions was that the Plaintiff's evidence was not sufficient to prove that the signature was not in T. K. Lalakea's writing. All this effort was expended and the Court's time taken up where a mere suggestion, made when plaintiff first began to attack the signature, of the defense ultimately put forward, would have dispelled at once all the evidence Plaintiff offered or could offer to show that the signature was not in T. K. Lalakea's writing.

From this it would appear that the defense ultimately put forward was an after thought on the part of the defense as the only way to avoid the force of Plaintiff's evidence which was practically conclusive, and the ruling of the trial court on the motion for non-suit, and the ruling of the Supreme Court on the interlocutory exceptions—that Plaintiff's evidence was sufficient to support a finding of forgery and non-de-

livery of the deed. The facts amply sustained the finding of the trial court that the attitude of the defense entirely changed between January 28, 1920, the date of the overruling of the motion for non-suit, and June 28, 1920, (the record said May 28, but this is a mistake for June), when they put in their defense. (R43-46.)

The trial court held that there was sufficient evidence at the close of Plaintiff's case to allow the case to proceed to the jury, had it been a jury trial, and therefore overruled the motion for a non-suit. (R223.) In overruling the interlocutory exceptions to the action of the trial court on the motion for non-suit, the Supreme Court said:

"The opinion evidence in this case is as strong and positive as opinion evidence could well be that the signature to the deed is not the genuine signature of T. K. Lalakea and would justify the Circuit Judge in finding as a fact that the deed was not executed by T. K. Lalakea." (R. 359-369 at 369.)

There is probably no matter of fact so entirely and conclusively within the province of the trial court alone as the observation of the conduct, manner, appearance and demeanor of witnesses. The defense called two witnesses, Namahoe and the Defendant, to establish the manner of signing and delivering the deed in the manner ultimately put forward by the defense. The trial court said: "I have never heard two witnesses testify that so indelibly impressed upon

my mind the falsity of their statements.” Of Namahoe the Court said: “He carried with him the atmosphere of a coached witness;” and of the Defendant the Court said: “He perjured himself in every material statement wherein he attempted to corroborate the statements of Daniel Namahoe as to the execution of the deeds.” (40.)

The trial court entirely disbelieved the evidence of the defense as to the manner of signing the deeds. This being the view of the trial court, it simply had before it for consideration on the question of forgery, the deed in question and the evidence of the Plaintiff’s witnesses that the signature was not T. K. Lalakea’s.

We feel that not only did the evidence in the case conflict, and that the evidence is sufficient to support and justify the findings of the trial court that the deed was a forgery and never delivered, but that in the light of all the evidence, we believe that no other conclusion could reasonably have been reached.

The findings of the trial court as shown by its decision (R38-49), discloses that it based its conclusion that the signature was a forgery principally upon the following facts:

The signature to the deed in question was not in the handwriting of T. K. Lalakea.

The Defendant claimed that on March 6, 1915, the day the deed was alleged to have been executed, his

father was so weak and feeble that it was necessary to assist him in signing his name.

Mr. Shipman saw the deceased on the same day and testified that he showed no indications of unusual feebleness and was sufficiently strong to transact business and pay him some money and that his hands were "no more shakier than what his condition had been." (R295.)

On March 20, 1915, two weeks nearer to the time of his death, T. K. Lalakea executed his signature to the lease, marked Plaintiff's Exhibit "C," without assistance, and that the signature bore the appearance of his usual handwriting; and that T. K. Lalakea's physical condition appeared to be the same on March 20, 1915, as it was on March 6th when Mr. Shipman transacted business with him. (R296-297.)

That T. K. Lalakea had never before nor since March 6, 1915, signed documents in the way contended by the defense that he signed the deed in question.

That T. K. Lalakea on and about March 6, 1915, was making entries in his own writing in his account book, marked Plaintiff's Exhibit "I," and that there were entries in the account book on March 1st, 3rd, 10th, 11th and other dates in T. K. Lalakea's own writing. (R298-299.)

That no reason was shown why Namahoe should have been sent for to witness the alleged signature, which he was never asked to do before nor since, when

Mr. Shipman, the deceased's attorney, who had prepared the documents and who habitually took T. K. Lalakea's acknowledgments, was within two short blocks of T. K. Lalakea's house (R270), while Namahoe had to be searched for and asked to leave his work at the Fish Market, which was considerably further away from T. K. Lalakea's house. (R244.)

The fact that after T. K. Lalakea had discussed with his family a division of his property among them after his death and wanted them all to be satisfied, he never mentioned to the other members of the family living in his house and who took care of him in his last sickness, that he had executed the deeds.

That the Defendant, after March 6, 1915, said nothing to anybody about the deeds having been signed, (R289-290), although he knew that the deeds were of the greatest importance to the family, and he did not know whether the deeds were valid without his father's acknowledgment, and he waited until his father was unconscious and dying before making any inquiries.

The Defendant sought to have Mr. Shipman as a notary, take the acknowledgments to the deeds when T. K. Lalakea was to all intents and purposes dead.

Namahoe did not see anybody about the house at the time of the alleged signing of the deeds except T. K. Lalakea, who is dead, and the Defendant who was to get nearly all of T. K. Lalakea's valuable property under the deed, although the Plaintiff was living

in the house at the time and taking care of T. K. Lalakea while he was sick.

That in face of Defendant's desperate excitement to get the deeds acknowledged just as soon as he knew his father was unconscious and dying, he said that he waited two months after the deeds were alleged to have been signed without making any inquiries whether the deeds were valid or not without acknowledgment, and whether an acknowledgment could be taken after a person was dead. (R146-147, 278-279.)

The fact that Mr. Shipman had conversations with T. K. Lalakea about signing the deeds at four or five different times, one of which was in the afternoon of March 6, 1915, about four hours after the deeds were alleged to have been signed, and that on the day T. K. Lalakea died and Defendant came to Mr. Shipman's office, Mr. Shipman did not recollect whether Defendant wanted him to go and have the deeds signed and acknowledged or merely to have them acknowledged. (R150-151.) If T.K. Lalakea had already told Mr. Shipman the deeds were signed, Mr. Shipman would have known that all that had to be done was to have them acknowledged. The only other view is that T. K. Lalakea deliberately concealed from his attorney, who had prepared the deeds, the fact that he, T. K. Lalakea, had signed them.

The above are some of the principal factors that lead the court to find as a matter of fact that T. K. Lalakea did not execute the deeds. The trial court

in its decision elaborates upon some of the circumstances as well as upon many other minor facts shown by the evidence. It is very readily observed that the trial court's final conclusion would not have been affected whether the attitude of the defense had changed or not between January 28 and June 28, 1920, when they put in their defense.

No explanation is offered or attempted in the record why Namahoe was sent for by T. K. Lalakea to witness his signature. If T. K. Lalakea wished to keep the documents a secret, it would be more logical to suppose that he would have made use of Mr. Shipman, who had drawn the deeds and who had habitually taken his acknowledgments.

The statement of the trial court that the circumstances point to the fact that whoever signed the deeds they were signed the same day T. K. Lalakea died, is immaterial to the court's finding that T. K. Lalakea himself did not sign the deeds, and this minor fact did not (or would not have) influenced the court's decision one way or another.

After the Court's decision and judgment for the Plaintiff, the case was taken to the Supreme Court of the Territory on writ of error. In its decision on the writ of error, the court said:

"After remand further trial was had resulting in a judgment in favor of the plaintiff. The Court in no uncertain language found that the signature of T. K. Lalakea, as subscribed to the deed, was a forgery and had never been executed by him,

and even assuming the same to be genuine delivery of the deed had never been made by the grantor to the grantee. Errors are assigned to these findings.

"Upon the interlocutory bill of exceptions to the denial of defendant's motion for a nonsuit this Court held that the plaintiff had made out a prima facie case in support of her claim and that the signature of her father to the deed under which the defendant claimed was a forgery and the deed was never executed by her father, and even if the signature were genuine no delivery of said deed had been made by the grantor to the grantee. This being so there was obviously sufficient evidence to sustain the ultimate findings of the trial court upon the same issue." (R. 302-303.)

The scope of review in the court below on writ of error is dealt with in Hawaiian Session Laws, 1919, Act. 44 Section 2:

"Section 2522 of the Revised Laws of Hawaii, 1915, is hereby amended so as to read as follows:

"Section 2522. Any error appearing on the record may be corrected; provided, however, that there shall be no reversal for any defect of form merely in any declaration, nor for any matter held for the benefit of the plaintiff in error; nor for any finding depending on the credibility of witnesses or the weight of evidence, and provided further, that no error going to the admission or rejection of evidence, or to the giving of or refusing to give an instruction to the jury shall be considered by the supreme court unless the same was made the subject of an exception noted at the time the alleged error was committed. No writ of error shall be quashed for defect of form.' "

We contend that the scope of review in this Court is no wider than it was in the Court below; and that in construing the local Territorial statute this Court will lean towards the interpretation adopted by the Supreme Court of the Territory (*Ewa Plantation Co. v. Wilder*, 9th C. C. A., last page of Opinion, filed May 28, 1923).

In *Territory v. Gay*, 26 Haw. 382 at 389, decided upon the 1919 statute referred to, the Court said:

“At the outset it is to be observed that the rights of the respective parties depend primarily upon the facts. There is little dispute as to the law involved. The Trial Court found what it believed the facts to be. However we might differ from those findings; whatever might be our opinion upon the credibility of the witnesses or the weight of the evidence, so long as the findings have more than a scintilla of evidence to support them they are binding upon this Court on this appeal. Consequently we are concerned only with the application of the law involved to the facts found and not to the credibility of witnesses nor whether the judgment is against the weight of evidence. The rule that findings of fact by the trial court, jury waived, are binding upon this Court if supported by more than a scintilla of evidence is too firmly established in this jurisdiction to require citation of authority. Moreover, on writ of error there can be no reversal of any finding depending upon the credibility of witnesses or the weight of evidence. Sec. 2522 R. L. 1915 as amended by Act 44 S. L. 1919; *Re Title of Kioloku*, 25 Haw. 357, 364.”

In re Kioloku, 25 Haw. 357, at Page 364, the Court said:

"Each party has introduced evidence supporting its theory of the case and in this respect there is some conflict in the testimony. The rule is that the findings of the Trial Judge will not be disturbed by review on writ of error where to do so this Court would be called upon to pass upon the credibility of the witnesses or the weight of evidence. (Sec. 2522 R. L. 1915 as amended by Act 44 S. L. 1919; *Akatsuka v McKay*, 24 Haw. 600, 604; *Kaleiheana v. Keahipaka*, 23 Haw. 169, 171)."

O. R. & L. Co. v. Kaili, 26 Haw. 121.

Moses v. Nobriga, 25 Haw. 483 at 489.

In *Territory of Hawaii v. Hutchinson Sugar P. Co.*, (9th C. C. A.) 272 Fed. 856, this Court declined to disturb the findings of fact of the judge of the Land Court, jury waived, and said at page 860,

"The evidence introduced in behalf of the Company we deem to be sufficient to sustain the judgment of the Land Court - - - ."

In *Hau v. Palolo Land, etc. Co.*, 20 Haw. 172 at 173, the Court said:

"The decision of a Circuit Court, jury waived, is equivalent to a verdict of a jury, and will not be disturbed if supported by evidence. It is settled beyond question in this jurisdiction, that the findings of fact of a Trial Court, jury waived, have the same force as the verdict of a jury."

This Court recently passed upon the rule in the Federal Courts in *National Surety Company v. Globe, etc. Co.*, 256 Fed. 601 at 602.

DELIVERY.

Delivery is a question of intent to be gathered from the attending circumstances and conditions under which the attempted delivery is made. An actual and formal delivery is never necessary and delivery may be constructive as well as actual. The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument to the end that it may presently vest title in another. This was so held by this Court in *Pickens v. Merriam* in 1921, 274 Fed. 1, at 15.

The question of intent is one of fact for the Trial Court, and the finding, as it does here, depending on the credibility of witnesses and a conflict of evidence, will not be disturbed on writ of error.

T. K. Lalakea kept the deeds to the different members of his family in his private bureau in his bedroom where he kept his money and other papers locked up. Two of the Plaintiff's witnesses testified that within an hour after T. K. Lalakea's death, the Defendant went to the bureau, unlocked it and took the deeds away. There is a conflict of evidence between these witnesses and the Defendant, who contended that he took the deeds off the shelf in the dining room, where he had put them on March 6, 1915, when T. K. Lalakea handed them to him.

The Trial Court in finding that there was no delivery of the deed in question in its decision, said:

“This court does not hold that the fact that these papers were found among the papers of the deceased, to which the Defendant had access, would of itself absolutely preclude any inference of a prior delivery during the lifetime of the deceased, as it is, of course, possible that the Defendant might have kept these papers in the bureau after a full and complete delivery to him. But in view of the Defendant’s positive testimony that he never kept these papers in the bureau, he cannot claim possession of this deed upon any possible theory that he kept this deed in the bureau as his own.” (R. 59.)

The fact that Defendant while attending to his father’s business and acting as his agent, had access to the bureau, where T. K. Lalakea kept his other papers and money, raises no presumption of delivery any more than it does that T. K. Lalakea gave Defendant all the money in the bureau. Defendant in going to the bureau for his father must have seen the deeds as he knew where they were kept prior to March 6th, and it is not unlikely that he made his mind up to get possession of them just as soon as his father died. His conduct at the time of his father’s death is suggestive of this conclusion.

The deeds to T. K. Lalakea’s other children as well as the deed to Defendant were all found together after T. K. Lalakea’s death. The fact that he never delivered any of the other deeds to the other members of the family is of itself not sufficient to preclude delivery of the deeds. It is merely a circumstance to be considered in arriving at a conclusion whether the deed

in question was delivered. The deeds were all treated alike according to Defendant's evidence, none of them were to be of any effect until after T. K. Lalakea's death. Even assuming the truthfulness of this evidence, it is clear that T. K. Lalakea did not intend any title to any of his lands to pass to the Defendant or his other children until after his death. Defendant said he considered the deeds were of no benefit until T. K. Lalakea's death. (R283.) It is essential to an effectual delivery that the instrument should become operative immediately, and pass title at the time of delivery, and not after death. If the instrument was not to go into effect until the grantor's death, there was no delivery sufficient to pass a present title.

The deed was not delivered to Defendant in escrow for the reason that there cannot be a delivery to the grantee as an escrow.

A mere placing of the deed in the hands of the Defendant did not of itself necessarily constitute a delivery. Assuming Defendant's evidence to be true, the inquiry is—what was T. K. Lalakea's intention on March 6, 1915? Defendant said after the deeds were signed and witnessed, T. K. Lalakea "passed" them over to Defendant and told him "to hold the deeds until he passed away and then to have them acknowledged." (R264.)

Defendant said T. K. Lalakea did not say anything else. (R265.) If this were so, Defendant's version is not quite as full as Namahoe's, who said, T. K.

Lalakea "gave the papers over to his son and told him to take very good care of them and if he should die to have them acknowledged." (R243.) On cross-examination Namahoe said in this regard: "At that time after the signing of our names he (T. K. Lalakea) gave all these papers to Solomon and told him to 'take care of these papers if I should pass take these papers, have them probated and give each its share.' " (R252.)

Nothing was to be done with any of the deeds until T. K. Lalakea died. They were not to be made use of in any way. Defendant was merely "to hold" them until then, or "take care of" them. When T. K. Lalakea died the deeds were to be probated or acknowledged. While this was in no way necessary to effect their validity, if they were to be delivered as deeds to operate on March 6, 1915, it is evident that T. K. Lalakea considered that it was necessary to have the deeds probated or acknowledged before they should take effect, because the deeds were not intended to be used until they were probated or acknowledged. Defendant said that he did not know whether the deeds were of any effect until they were acknowledged. (R279.) His desperate efforts to have them acknowledged just as soon as his father died when he went to Mr. Shipman's office, would indicate that the Defendant considered acknowledgment was necessary to make them effective.

In passing on the question of delivery, the Trial

Court has assumed the truthfulness of the evidence of Namahoe and the Defendant. But as the Trial Court found that he disbelieved these witnesses, the question of delivery might have rested there, and their evidence might have been excluded from any consideration whatever. But even assuming the truthfulness of their evidence, the circumstances fall far short of what is necessary to constitute a complete delivery.

The contention of the Defendant in the Court below seemed to be that the delivery to the Defendant was an absolute one and the delivery to the other grantees was merely in escrow. It was urged that the delivery to the Defendant was an absolute delivery as distinct from the others because there could be no delivery to a grantee in escrow. This, however, does not mean that, therefore, the delivery was absolute as we shall show by citations below. If the Court is justified in its finding that there was no intent to deliver the other deeds, then here was no delivery of the deed in question to the Defendant, and the mere fact that he could not hold in escrow for himself, simply has the effect of nullifying as a delivery the passing over of the deed to him. This is so not only as a matter of law, but also in this case as a matter of fact.

T. K. Lalakea neither parted with dominion or control over the deeds nor over the property. Defendant said he held the deeds subject to his father's instructions (R278)—he merely acted as agent as he did in looking after his father's other business. T. K. Lala-

kea treated the land as his own and leased part of it on March 20, 1915, for 10 years, when he knew he had but a short time to live. Defendant acquiesced in his father's act of ownership. (R277-278.)

It was also contended in the court below by the Defendant, that the Plaintiff had foreclosed herself of the right to claim that no delivery was proven, by the fact that at the opening of the case it was agreed that after the noting of certain stipulations covering evidence necessary to be offered by the Plaintiff as constituting her *prima facie* case, the Defendant might offer in evidence the deed in question and that such deed would be considered as constituting a *prima facie* case on the part of the Defendant. It was argued that by this stipulation the plaintiff had admitted that the instrument so offered by the defense was in fact a deed, and therefore the Plaintiff was precluded from contending that it was not a deed but an attempt at a testamentary disposition of the grantor's property.

It is very apparent from the record that the purpose of the stipulation, and the intention of the parties in introducing it, was to expedite the matter of the trial only in so far as any question of procedure was concerned. So as to avoid any issue as to the method of procedure and any question of the duty of going forward with evidence. There was no attempt on either side to stipulate as to the effect to be given the deed in question.

The Defendant, recognizing that in order that any

effect might be given this stipulation, it was necessary that the same be recognized and approved by the Trial Court, pointed out that at the beginning of the Trial Court's decision, he expressly recognized the same. The reference to this stipulation by the Trial Court is only by way of narrative of the proceedings of the case, and his discussion in his decision and his conclusions with reference to this deed, show that the Trial Court recognized the stipulation merely for the purpose of procedure and not as affecting the rights of the parties or the legal effect to be given this instrument. The only way the Trial Court could have recognized the stipulation and given it the effect contended for by the Defendant, was to have found for the Defendant upon all of the issues.

This point was not raised in the Trial Court and we contend that it is not available to the Defendant for the first time on writ of error. The record fails to disclose that the Defendant objected to the evidence, introduced by the Plaintiff, which attacked the validity of the deed; namely, its execution and non-delivery by T. K. Lalakea. Had the Defendant at the trial intended to rely on the point that by reason of the stipulation, the Plaintiff was estopped from contending that the instrument was not good and valid as a deed, the Defendant would at least have objected to the evidence offered by the Plaintiff. Defendant offered the evidence from which the Trial Court found the instrument was a will, if it were anything. If anybody

is foreclosed, it is the Defendant by his conduct of the case, and failure to object to evidence, and by offering evidence inconsistent with the theory that the instrument was a deed, and showing that if anything it was an attempt at a testamentary disposition.

In 25 R. C. L. 1096, it is stated, "The terms of a stipulation should not, however, be so construed as to extend beyond that which a fair construction justifies." But granting that this stipulation can be considered as an agreement between the parties that the instrument is a valid deed, it is at most a stipulation as to the legal effect of a certain fact or facts, and it has been repeatedly held that the Court is not bound by a stipulation of the parties as to the law or the legal effect to be given to an admitted fact.

A case in point is *Prescott v. Brooks*, 94 N. W. 88, the Court said:

"The stipulation of Counsel that it (a note) was not paid was at the most, in the case, an agreement upon a legal conclusion, and was properly disregarded by the court, to whom the case was submitted for judicial determination. Stipulations of Counsel as to facts are binding, but we do not understand that it is within the province of Counsel to substitute their judgment upon questions of law for that of the court, and thus bind the court to what, in this case, we consider would have been an erroneous judgment."

See also:

Lumber Co. v. Bibbs, 73 Pac. 864.

Jones v. Madison Co., 18 So. 87 at 88.

Wells v. Ben. Ass'n, 29 S. W. 607.

Detroit v. Beckman, 34 Mich. 125.

In 25 R. C. L. at page 1099, it is stated,

“The rule is generally recognized that trial courts may, in the exercise of a sound judicial discretion and in the furtherance of justice, relieve parties from stipulations which they have entered into in the course of judicial proceedings, and that on appeal the determination of the trial court will not ordinarily be interfered with, except where a manifest abuse of discretion is disclosed.”

Even if it could be said that the stipulation in question was one referring to any substantial rights of the parties, by his decision the Trial Court has relieved the Plaintiff from the stipulation, and it cannot be contended that it committed an abuse of discretion in so doing.

We will cite some of the authorities, applicable to the case at bar, under which we contend the Court was justified under the law and under the facts in this case in holding that there was no delivery and that if the instrument was anything, it was an attempt at a testamentary disposition of property. We also refer, for further discussion of this question, to the Trial Court's decision on pages 50 to 84 of the record.

If an instrument is to take effect as a deed it must take effect immediately upon delivery and pass a present title and there can be no delivery to a grantee in escrow.

Coles v. Bedford (Mo.) 232 S. W. 728.

Mrs. Phelps made a voluntary deed of land to two

grantees, Anna Bedford and Mary Bedford. Mrs. Phelps gave the deed to one of the grantees, Anna Bedford, saying, "You take this and put it in your box and keep it and whenever anything happens you, sent it to Springfield, Mo., and have it recorded."

The Court said at page 731,

"True, by this delivery it may be said that Mrs. Phelps parted with domain over the deed. However, when she said 'when anything happens you sent it to Springfield, Mo., and have it recorded,' that language indicates that it was her intention that the deed was not to become operative until her death. This interpretation is borne out by further testimony of the witness, George Bedford when, in response to an interrogation by the Court, 'She told your sister to take the deed and put it in her box?' He replied 'Yes sir, and keep it and whenever anything happened to her, when she died, to send it to Springfield, Mo., and have it recorded.'

"Accordingly, upon authority of the adjudicated cases, the instrument was testamentary in character, did not pass a present interest in the property to the grantees, and hence was not good as a deed notwithstanding the intention of Mrs. Phelps that it should take effect at her death. Huey v. Huey, 65 Mo. 689; Terry v. Glover, 235 Mo. 544, 139 S. W. 337; Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677; Murphy v. Gabbert, 166 Mo. 596, 66 S. W. 536 (and other cases cited).

"Under these authorities even a valid delivery within the lifetime of the grantor is not shown. This evidence fails to show that the handing of the deed to one of the grantees was done with the intent of passing an estate in praesenti, and intent

is a material matter on the question of delivery. If the grantor did not give the deed to the grantee with intent of passing title at that time, then there was no delivery within contemplation of law.

"As further indicative of the fact that it was not the intention of Mrs. Phelps that the deed should take effect and pass title as a present transfer, the record discloses that after the date of execution of the deed, she continued, through agents, up until the time of her death to retain the management and control of the property conveyed, even endeavoring to find a purchaser therefor."

Wilenou v. Handlon (Ill.) 69 N. E. 892.

A land owner executed a deed to his daughters, who lived with him, and after having the deed recorded delivered it to one of his daughters, telling her to place it among his papers, that being the first that the daughters had known of the deed. Thereafter the property was assessed to the daughters, and insurance written on it in their names, but it was not shown that the father knew of such facts. He and the daughters continued to live on the land, divided the profits between them as before. At the time the deed was executed the father was ill and believed he would not live long, and he had talked with his daughters about the land, and stated that on his death he wished it divided between them. It was shown that he had stated to several parties that he had deeded the land to the girls. It was held that the evidence showed that the deed was intended as a testamentary disposition of the property, and not as a present conveyance. The fact that the grantor caused his deed to be recorded, gave it

to one of the grantees with instructions that she should place it among his papers with a view that it might be found in case of his death, rebutted any presumption of delivery. The fact that the grantor remained in possession of the land after execution of the deed was an important factor in determining whether the deed was delivered. The fact that the grantor stated to various persons that he had made a deed of the farm to his daughters was not inconsistent with the view that he intended the deed to take effect after his death.

The *Wilenou v. Handlon* case was cited with approval in *Cassidy v. Holland* (S. D.) 130 N. W. 771 at 773; *Weber v. Brak* (Ill.) 124 N. E. 654 at 656; *Ackman v. Potter* (Ill.) 88 N. E. 231 at 234, and other cases.

McClintick v. Ellis (Okl. decided 1922) 209 Pac. 403. At 405 the Court said:

“This Court on numerous occasions has discussed the question of delivery of a deed, and has repeatedly announced the rule that the question *is always one of fact*, and depends solely upon whether the grantor intended that the instrument in question should become operative immediately and vest title in the grantee.” (Cites authority.)

Powers v. Rawles (S. C. decided 1922) 112 S. E. 78, 84-85. It was held that a deed purporting to convey a fee simple title takes effect only when delivered to the grantee or someone for him, with the intention on the part of the grantor to part with all interest and domain over the land by such delivery. Delivery in-

cludes not only an act by which the grantor evinces a purpose to part with the control of the instrument, but a concurred intent thereby to vest the title in the grantee.

See also *Elliott v. Murray* (Ill.), 80 N. E. 77.

In *Troup v. Hunter* (Ill.), 133 N. E. 56 at 58, the Court after stating that delivery was a question of intent, said:

"The mere placing of the deed in the hands of the grantee does not, of itself, necessarily constitute delivery. In such cases the inquiry is: What was the intention of the parties at the time? And that intention, when ascertained, must govern. (cites authority) A deed must take effect upon its execution and delivery or not at all. The delivery must be unconditional, unless in escrow. *This deed was not delivered in escrow, for the reason that there cannot be a delivery to the grantee as an escrow.* Baker v. Baker 159 Ill. 394. 42, N. E. 867 Russell v. Mitchell 223 Ill. 438, 79 N. E. 141."

The question of intent of delivery is one of fact for the Trial Court.

Singleton v. Kelly (Utah, decided 1922) 212 Pac. 63 at 66 (10).

McClintic v. Ellis supra (Okl.) 209 Pac. 403. The Court said at 405:

"As we have said, delivery being a question of fact, and the trial court having passed on the evidence and found in favor of the plaintiff, and ordered the cancellation of the deed, the judgment of the trial court should not be reversed, unless we find same to be against a clear weight of the evidence."

Burnham v. Burnham 111 N. Y. S. 252, (unanimously affirmed without opinion 116 N. Y. S. 1132).

Ackman v. Potter (Ill.) 88 N. E. 231 at 234.

If the parties think that the deed is of no effect between them until after acknowledgment there can be no delivery.

Singleton v. Kelly supra (Utah) 212 Pac. 63 at 65 the Court said:

"While Mr. Henroid was mistaken as to the law, and the deed was good as between the parties when signed and delivered, both the grantor and the grantee doubtless thought the deed of no effect until after acknowledgment and recording, Mr. Henroid testified that they 'understood they would have to go before a notary public before they could have it delivered.' If the parties had that in mind, was it an intentional and unqualified delivery? In *Kinney v. Parks*, 137 Cal. 527, 70 Pac. 556, the facts were that a wife gave her husband a deed under the belief that it would not be valid until recorded. He recorded it, nevertheless, and in a suit by the wife to recover the property it was held that the delivery was not valid. See also *Stone et al., v. Daily*, 181 Cal. 571, 185 Pac. 665."

If the grantor retains control or the right of dominion or revocation over the deed, delivery to take effect on death, fails to pass a present title.

Singleton v. Kelly, supra (Utah) 212 Pac. 63 at 66 (8 and 9).

Where the Court also held that the question whether the grantor intended the delivery to be in *praesenti* is a question of fact.

Williams v. Kidd (Cal.) 151 Pac. 1.

Hayden v. Collins (Cal. App.) 81 Pac. 1120 at 1122.

Kananaugh v. Kananaugh (Ill.), 103 N. E. 65. Where it was held that the placing of a deed in the grantee's hands is not a delivery if the grantor did not intend that title should then pass and that he should lose control of the deed, and would not be effective for that purpose if he continued to exercise actual ownership, treating the property as his own. A deed is ineffective as a present conveyance if the grantor retains any dominion and control over it.

Subsequent dealing with the property by the grantor is evidence of acts of ownership.

Coles v. Bedford, supra (Mo.) 232 S. W. 728 at 732, the Court said:

"The continued exercise of general control over the property, as evidenced by these letters is entirely consistent with the theory that it was the intention of Mrs. Phelps that the deed was not to become effective until her death."

See also Williams v. Kidd, supra (Cal.), 151 Pac. 1.

Where the court said at page 7 (10):

"The conduct and declaration of Williams covered a period subsequent to the making of the deed and while Kidd held it as a depository, and we are satisfied that such acts, conduct, and declarations of Williams with reference to the property during that period were properly admissible as bearing on the issue as to whether there had been a delivery of the deed. All of these matters had some tendency to show that there was no intention on the part of Williams to deliver it

except as a part of a testamentary scheme which he had abandoned."

McClintick v. Ellis, supra (Okla.), 209 Pac. 403.

Wilenou v. Handlon, supra (Ill.) 69 N. E. 892 at 896.

An instrument in whatever form which passes no present interest but is to take effect on the death of the maker is testamentary in character and operates as a will.

We are not concerned whether the instrument was a deed or a will, if it was forged it was void as both, and for all purposes; but even if the instrument was executed it was not delivered to take effect as a deed.

Ihihi v. Kahaulelio. In Error to the Supreme Court of the Territory of Hawaii decided by this Court in April, 1920, 263 Fed. 817. At 819 the Court said:

"It is the general rule that an instrument, whatever form it may take, which passes no present interest, but is to take effect on the death of the maker, is testamentary in character, and operates as a will, if executed with requisite formalities. *If it is 'partly or wholly in the form of a deed, it is not a deed, if it is not to become operative until the maker's death,'* (cites authority). Said Judge Cooley in *Bigley v. Souvey*: 'The instrument given by Defendant was a deed in form, but was testamentary in its nature and passed no title whatever. . . .'"

Ackman v. Potter (Ill.) 88 N. E. 231 at 234:

"A deed must take effect upon execution and delivery, or not at all. A deed of land which was not to take effect until the death of the grantor is void, as being an attempt to make a testamen-

tary disposition of property without complying with the statute on wills."

The Hawaiian statute on wills—Revised Laws of Hawaii, 1915, Section 3260, provides:

"Writing; signature; witnesses. No will shall be valid, unless it be in writing and signed by the testator, or by some person in his presence and by his expressed direction, and attested by two or more competent witnesses subscribing their names to the will in the presence of the testator."

Sec. 3262. "Gifts to witnesses. All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void, unless there are two other competent subscribing witnesses to the same, but a mere charge on the estate of the testator for the payment of debts, shall not prevent his creditors from being competent witnesses to his will."

In August, 1914, T, K, Lalakea called his family together and discussed with them leaving his property to them and the division of his estate. If he had executed the deeds as contended by the evidence for the defense (which the trial court declined to believe) the alleged execution would be in compliance with the statute on wills, but the gift to the Defendant would be void.

CONTINUANCE

The Trial Court's overruling of Defendant's motion for a continuance was a fair exercise of discretion, and we submit is not reviewable on Writ of Error.

The original complaint is not set out in the record, but it appears that this action was commenced some-

time prior to January 6, 1919, when Defendant answered by his Attorneys, Messrs. W. H. Smith and W. S. Wise. (R16.) The trial began on December 18, 1919, in the presence of both the last-named attorneys (R101-131), and continued on various days until January 28, 1920 (R116, 223), when Defendant made a motion for a non-suit which was overruled; from this ruling Defendant requested and was allowed an interlocutory Bill of Exceptions to the Supreme Court of the Territory. (R116, 223, 355-356.)

Defendant's motion for a non-suit involved two simple questions: Whether Plaintiff's rebuttal evidence of *forgery* and *non-delivery* was sufficient to overcome the direct testimony of the subscribing witnesses, as set out in the Circuit Judge's certificate of proof attached to the alleged deed. (R222-223.)

The Supreme Court of the Territory overruled the interlocutory bill of exceptions and filed its decision on May 19, 1920 (R358-370).

Notice of the Supreme Court's decision was given to the Trial Judge on May 21, 1920. (R370-371.)

The case came before the Trial Court, to be set for further trial, on June 17, 1920. (R117.) One of Defendant's Counsel, Mr. Wise, announced to the Court that he was not ready, that Mr. Smith, his co-Counsel, was away and that Mr. Wise did not want to have the case go to trial in Mr. Smith's absence, and requested the Trial Court to continue the case until Mr. Smith returned, or long enough to get a

cable for his return. The Trial Court announced that the Supreme Court had rendered its decision on the motion for non-suit, and that Mr. Smith did not leave until several days after the decision was rendered; that he was present in the Supreme Court and the Trial Judge was there also, and that Mr. Smith did not mention anything about the case to the Trial Judge; that Mr. Smith had ample opportunity of interviewing the Trial Judge about the case before he, Mr. Smith, left for the Coast. The Court said to Mr. Wise: "*It seems to me that you are capable of handling this case.*" . . . "I'm not seriously going to consider the continuance of this case because of the absence of Mr. Smith. The Court will try this case, Mr. Wise. . . ." Mr. Wise replied to the Court: "*If this case is to be set for trial, at least have it set for trial the early part of the coming week.*" (R117-118.) The Court set the case for further trial the following morning, (R119), but it was not reached until eleven days later (R121-123).

On June 17th, Messrs. Carlsmith & Rolph entered their appearance as additional counsel for Defendant. The Court then continued the case until 10:00 o'clock the following morning. At the time of entering their appearance, counsel made no application for a continuance. (R119).

The case next came up in Court on June 24, when Mr. Carlsmith requested that it stand over until September 1st (after the summer vacation), and that if

the case were set for trial in the near future, he would have to file a motion for continuance; and that Mr. Wise had been unable to assist him in the case. (Mr. Wise's statements will appear later.) Plaintiff's Counsel stated that if the case went over for a few days it would have to go over until September as the statute said no term case should be tried in July and August, that their clients were in town and ready to proceed with the case. The Court then set the case for trial on June 28th, 1920. (R119-121.)

On June 28, 1920, Mr. Carlsmith made a motion for continuance "for at least one week in order to enable Counsel to prepare for the trial," supported by his own affidavit and the oral evidence of Mr. Wise. (R127, 18-27, 225-234.) The motion was overruled. (R123, 234-235, 35-36.)

Mr. Carlsmith's affidavit in support of the motion is set out in full (R19-27.) It shows, among other things that Mr. Carlsmith's partner was engaged in other matters; that Mr. Carlsmith was retained about noon on June 17, 1920, to represent Defendant in this case and two other matters pending in the same Court, one of which involved Defendant's accounts as Administrator of his father's estate in probate, where he was liable to be surcharged between \$6,000 and \$10,000, and the other matter was a suit brought by one Todd on a promissory note involving \$1,621.65. The value of the property involved in the case at bar was "in the neighborhood of \$400,000.00." That in the afternoon

of June 17, 1920, the Court had ordered Mr. Carlsmith to be prepared for the setting of the Todd case and the case at bar "at an early date"; that Mr. Carlsmith then spent his time preparing for and trying the probate and Todd cases (as detailed in the affidavit); that he had read the transcript of testimony of the previous trial of the case at bar "but insufficiently to enable affiant to make the proper preparation for the presentation of the Defendant's case"; and that if the case went to trial on June 28th at 9:00 A. M. Defendant would be unable for "lack of preparation of his Counsel" to fairly, fully and adequately present his defense. That Mr. Smith left for the Mainland in May, 1920, and before his departure told affiant that the Trial Judge was ill in Honolulu "and it was his (Mr. Smith's) *belief* that the said Judge would be unable to return to his official duties at any time before the first of July, *at which time the causes pending in the Fourth Circuit Court are not triable*, and said W. H. Smith stated to this affiant that he *believed that no causes could be heard until his return from the Mainland in the month of September following.*"

Mr. Wise testified (R. 225-234) that he was 65 years old, and had practiced law in the Courts of the Territory 34 years; that by reason of defective hearing he had not for the past two years undertaken any cases that required close attention, that although he had been present at the earlier trial of this case, Mr. Smith had conducted the trial, and that he, Mr. Wise, had made

no preparation for the further trial; that sometimes he heard what was going on and sometimes not, that he was leading Counsel for Defendant "from the very first until the present day" (R. 228-229); that he had acted as one of the Counsel in the probate matter and in the Todd case, but confined himself in the main to uncontested matters. On cross-examination *Mr. Wise admitted that when Plaintiff rested he was asked if he was ready to proceed with the trial, and that he had stated that he was* (R. 231); and that *he thought that he had told Mr. Carlsmith everything he, Mr. Wise, knew about this case* (R. 232), and that he had several consultations about this case with Mr. Carlsmith (R. 233); that he had talked with Defendant's witness Namahoe (R. 231); and that if anybody had a knowledge of the affairs of T. K. Lalakea's Estate, it was he, Mr. Wise. (R. 228-229.)

The Court at the morning session on June 28, 1920, overruled the motion for continuance as follows: "The ruling on the motion and affidavit and oral evidence on the motion for a continuance; the court feels that this motion is largely discretionary and that it has been dispelled by the oral evidence of Judge Wise and that being the only reason presented at this time why the motion should not be granted. The motion is therefore overruled." (R. 234-235.)

Either the reporter did not get all that the Court said or the record is faulty. What the Court evidently intended to say was that whatever doubt the Court

might have entertained about Mr. Wise's physical ability to proceed with the trial was dispelled by his oral evidence, and, the motion being largely discretionary, the Court would overrule it. The Court had already on June 17th stated it was satisfied that Mr. Wise was otherwise capable of handling the case. The trial court in its decision filed February 7, 1921 (R. 35-36) enlarged on its previous ruling as follows:

"On June 17, 1920, this case was placed on the calender of the court for the purpose of setting the same for trial at an early date and the Court intimated to counsel that the case would be tried during the month of June and according to the minutes of the Court Mr. Wise stated, 'if this case is to be set for trial at least have it set for the early part of the coming week.'

"The Court made the following order, 'Law No. 671, *Hannah Maikainai v. Solomon K. Lalakea*, will be set for trial tomorrow morning at ten o'clock.' This order was made at the morning session. At the afternoon session of June 17, Mr. Carlsmith appeared in court and formally entered of record the name of Carlsmith & Rolph as attorneys for Solomon K. Lalakea.

"On June 28, 1920, Carlsmith & Rolph filed a motion for a continuance for one week, which motion for a continuance was predicated upon an affidavit signed by Mr. Carlsmith.

"If the motion was granted it would have meant a continuance of this case until September 1, 1920, as the statute prohibits the trial of a case of this nature during July and August.

"The statute does not read, 'No trial shall be begun,' but 'no trial shall be had, etc.'

"Testimony taken on the motion attempted to convey the impression to the Court that W. S.

Wise would be of no assistance to associate counsel by reason of his deafness and Judge Wise demonstrated to the Court beyond the shadow of a doubt that his hearing is splendid.

"Mr. Wise has been counsel for defendant from the inception of this case and took an active part at the time plaintiff presented her evidence.

"Mr. Wise has been an active practitioner before the present Judge for the past four years. *Mentally and physically his powers are unimpaired. He demonstrated in open court that his hearing is good* and he has been engaged in the active practice of his profession prior to and subsequent to this trial.

"The motion for a continuance was without merit."

After the ruling on the motion on June 28, Defendant's Counsel announced that they had only two witnesses, Defendant and another, and that the evidence would only take a day to present. (R. 235.)

The Court adjourned until the afternoon, and Defendant's evidence was completed that afternoon, and the case was argued the following day, when the Court said it desired briefs to be filed "allowing the attorneys ample time." (R. 291, 126.) They were given ample time as the decision was not rendered until February 7, 1921. In the meantime, immediately after the summer vacation on September 1st, the Court reopened the case for the purpose of taking further evidence. (R. 291.)

There was time to communicate with Mr. Smith before September 1st, and Mr. Carlsmith's affidavit

stated that Mr. Smith was returning from the Mainland in September, 1920. (R. 25.)

On October 25, 1920, the case again came before the trial court on the question of mesne profits. (R. 127.)

No attempt was made to introduce further evidence for Defendant, or to show that any further or newly discovered evidence existed; no motion for a new trial was made after the Court's decision was rendered; and there is no showing in the record that Defendant was injured or prejudiced in any way by the Court overruling the motion for a continuance.

Hyde v. State, 67 Am. Dec. 637;

Willison v. State, 7 Tex. App. 400;

State v. Pruett, L. R. A. 1918 A 656 at 659.

When the decision was rendered on February 7, 1921, Defendant's Counsel asked for time to file written exceptions, which was granted. (R. 127-128.)

The Supreme Court of the Territory, when the case came before it again on Writ of Error, sustained the trial court's ruling. We beg to refer to the Supreme Court's opinion at pages 309-310 of the Record.

Defendant's Counsel had the advantage of knowing Plaintiff's case. There were only two witnesses called for the defence, namely, the Defendant and Namahoe, and Defendant's Counsel had already talked with Namahoe. On June 17th Mr. Wise agreed to the case being set for the following week and it was eleven days before the trial was reached. Mr. Carlsmith entered his appearance on June 17th, but did not present his

motion until June 28th when he said it would take him a week to prepare the case. He had already had 11 days. What preparation, if any, was required is not disclosed. Mr. Carlsmith's statement at most was merely a conclusion rather than a statement of facts.

Mr. Smith absented himself without leave, whether on business or not does not appear, but he had an opportunity of consulting the trial judge and did not avail himself of it. Mr. Smith's *belief* that the trial judge would not be able to try the case before September was not induced by anything said by the trial judge or by representations of Plaintiff's Counsel.

The trial judge based his ruling on his observation of the witness and on the evidence which is conflicting and sufficient to support the ruling. The matter was one of discretion, and the ruling will not be reversed on Writ of Error under the statute and authorities heretofore cited where the ruling depends on the weight of evidence or conflict of evidence.

In *Missouri etc. Co. v. Elliott* (8th C. C. A.), 102 Fed. 96, 98, 99, the Court held that an order denying an application for a continuance would not be reversed on Writ of Error in the Federal Courts.

See also *Belvin v. United States*, 260 Fed. 455 at 459.

McBryde Estate v. Gay, 14 Haw. 313 at 314, the Court said,

"An application for a continuance under the practice in this territory is addressed to the discretion of the Court, Sec. 1274, C. L. It has been held by this Court that where a ruling on an ap-

plication for a continuance is complained of the court will only look into the matter so far as to ascertain whether there was an abuse of discretion. *Queen v. Ah Kiao*, 8 Haw. 466-8."

Waldeyer v. Wailuku S. Co., 19 Haw. 245, at 257, the Court said,

"Upon the undisputed facts we could not say that the judge abused his discretion, but, going further, what right have we to say that he believed the affidavits on the one side or those upon the other. I quite believe the statement of Mr. Kinney that he considered further time to be necessary for the defense and that a transcript of evidence before the arbitrators was needed in order to prepare interrogatories for Halverson. The trial court may have thought otherwise. How do we know what he thought, as his ruling was based partly upon his view of the facts and partly upon his view of the law?"

Yamashiro v. Costa, 26 Haw. 54 (1921), the Court said at page 62,

"We hold that the motion, . . . , was in effect a motion for a continuance and was addressed to the sound legal discretion of the Court and unless that discretion was clearly abused there was no error. *McBryde Est. v. Gay*, 14 Haw. 313; *Waldeyer v. Wailuku Sug. Co.*, 19 Haw. 245."

See also *Re Goo Wan Hoy*, 24 Haw. 256 at 257.

Absence of one Counsel where other competent counsel are present at the trial is not sufficient reason for holding that the trial judge abused his discretion in denying a continuance.

Copper River Min. Co. v. McClellan (9th C. C. A., 1905), 138 Fed. 333. At 339 this Court said,

“The ground of the motion for continuance in this case was the absence of some of the appellant’s witnesses and the absence of two of its associate counsel. The motion for a continuance was made on February 6, 1903. The suit had been commenced on August 11, 1902. Service of process had been made on September 9, 1902, on all the appellees residing in the District of Alaska. They answered on October 8th. All the other defendants in the suit except Abercrombie answered on January 30, 1903. . . . The motion, however, specified as grounds of continuance (among others) . . . that two of the principal attorneys of the appellant, Hon. W. B. Heyburn and E. L. Campbell, were in Idaho and San Francisco, respectively, and could not be brought to participate in the trial if had at that term of the court, and that said attorneys did not know that McClellan, Hamlin, H. T. Gates and Benedict had voluntarily answered; that their voluntary appearance had taken the appellant by surprise, and had found it unprepared for trial There was no affidavit of the truth of those facts so set forth in the motion. . . . On February 9, 1903, the Court denied the motion. We find in the record no sufficient grounds for saying that in so doing the Court abused judicial discretion. The affidavits in support of the motion for continuance failed to show diligence in procuring the attendance of appellant’s witnesses, nor was the absence of appellant’s counsel, under the circumstances, necessarily a ground for a continuance. The appellant was represented by three of its attorneys at Valdez. Mr. Campbell had, according to the showing, been notified at San Francisco in December that the appellees would insist upon trial at the first term of the court. . . .”

First National Bank of Omaha v. Dye, (Neb.) 102 N. W. 614, the Court said:

"The Plaintiff was represented on the trial by competent and experienced attorneys—Messrs. Wolcott & Morrissey, of Valentine, who had begun the action and had charge of framing the issues, but who were associated with Mr. John W. Parish, of Omaha, as Senior Counsel. Parish was prevented from attendance by reason of a change of time in a train schedule of which he was ignorant at the time, and notified both his associates and the presiding judge of the fact, and asked to have the trial postponed one day, so as to enable him to be present. Such a postponement would have delayed the case beyond the term, and the local attorneys therefore prepared and filed a motion for a continuance, supported by the affidavits of one of them reciting the facts of unavoidable delay. The motion was overruled."

Snyder Co-Op. Ass'n. v. Brown, (Okla.), 172 Pac. 789, at page 791:

"For instance, it is urged that the court erred in denying the motion for a continuance presented at the time the case was called for trial; the ground of the motion being that one of the counsel for the plaintiff in error who resided at Snyder, and who had charge of one branch of the defense, was seriously ill and unable to be present at the trial and was in such a mental and physical condition that he could not, with safety to his health, be consulted in regard to the case, and for that reason a postponement of trial was asked. The Court said that the party was represented by two able lawyers present, and denied the continuance. The application was addressed to the sound judicial discretion of the court. It does not appear that in this instance this discretion was abused."

See also *Chambers v. Modern Woodmen of America*, (S. D.), 99 N. W. 1107 at 1109.

Where there are two attorneys for a party, the fact that one has been retained only a short while is not sufficient ground for holding that the trial judge abused his discretion,

Hostetter v. Green, (Ky.), 185 S. W. 511 at 513 the Court said:

“It is true the affidavit of one of their attorneys showed that his (counsel’s) employment by appellant was effected only two weeks before the trial of the case, but this did not authorize the continuance, as appellant’s other attorney had been connected with the case at the time of one or both of the previous trials, and, in the absence of a showing to the contrary, the trial court had the right to assume that his familiarity with the case and skill as a lawyer, supplemented by the ability and assistance of the counsel later employed, would enable appellants to obtain the full benefit of whatever defense could be made for them.”

Mere absence of counsel is not a sufficient ground for a continuance.

Cotton States Life Ins. Co. v. Edwards, 74 Ga. 220, the Court said at 225-7:

“That continuances of causes on account of the absence of counsel are not favored has been more than once decided by this Court. Such excuses should be discountenanced; it is the duty of the counsel to attend, and their failure to do so is no cause for postponement, unless in cases of necessity or misconception . . . Both of the counsel in this case were absent without leave and without notification to the court. One was attend-

ing to a case in this court from a circuit other than that in which this cause was pending, and the other to a case in the Circuit Court of the United States sitting at Savannah. This case was set on Saturday, under the rules of the Superior Court of Bibb County, to be heard on the following Tuesday. The counsel had notice that a session of the court would be held on Saturday for setting cases, and from the record it appears that one of them knew that the case was then set to be heard on Tuesday. He was suddenly and unexpectedly called away to attend to a case in this court. He wrote to the judge asking protection as to another case set for the same day, but said nothing about this, here was no case of necessity or misconception. The counsel *may possibly have believed that the case would not be reached*, or if reached would, not be tried until later in the term. This belief was not induced by any announcement of the Court, or any consent or agreement of the opposite party or his counsel, and without some such cause, it afforded no ground for a new trial. 63 Ga. 428. If counsel takes the risk of having the case called and tried in his absence, this also is no ground for a new trial. 69 Id. 767. Absence without leave, to attend trials of cases pending in other courts is no ground for the continuance of causes. (Cites authority.)

"The presiding Judge, after endeavoring to get plaintiff to consent to a postponement of the cause and failing so to do, ordered it to trial, holding that the voluntary absence of counsel to attend to a case in the Supreme Court, not from the Circuit in which he resided, was not a legal showing. We agree with the judge that, if any other rule should prevail, the judges of the Superior Courts would, in many instances, be powerless to transact the

business of their circuits . . . Be this, however, as it may, the judges of the Superior Courts are necessarily entrusted with discretion as to continuance of cases for the term, or the postponement of their hearing to another period during the same, and unless such discretion is flagrantly abused in overruling a showing for continuance that comes fully up to the requirements of the law, we do not feel authorized and empowered to interfere with its exercise and will never do so unless some legal right of the party making the showing has been invaded or withheld, and injury or injustice has been thereby done. Where the postponement asked is a matter of indulgence and favor, and not of right, we are powerless to interpose." (Cites authority.)

See also *Baumberger v. Arff*, 96 Cal. 261.

The fact that counsel was too busy with other cases to make preparation in the case in question is not sufficient ground for a continuance.

Smith v. State, (Ind.), 31 N. E. 807.

People v. Collins (Cal. Sup. Ct.), 17 Pac. 430.

City of Covington v. Bostwick, (Ky.), 82 S. W. 569.

Pennsylvania Co. v. Rudel, 100 Ill. 603, the Court said at 608:

"On September 16 defendant's former attorneys withdrew from the cause, and on the same day other counsel was retained, and a motion, for that reason, was made for the continuance of the cause to the next term, to allow time for preparation for trial. The overruling by the Court of this motion is assigned for error. The cause did not come on for trial until September 23. We see no abuse in the exercise of discretion of the Court in denying the motion, which calls for our interference."

Portland & Oregon City Ry. Co. v. Sanders (Or. 1917), 167 Pac. 564 at 566:

“It will be kept in mind that Sanders’ affidavit states, ‘I have been unable to prepare my case for trial on Tuesday next.’ What preparation, if any, was required is not disclosed, and that part of the sworn declaration last quoted makes the language thus employed the affiant’s conclusion of law applicable to his conception of the case rather than a statement of material facts upon which the Court was required to predicate its determination. The case thus made by the affidavit does not show any abuse of discretion in denying the motion for a postponement of the trial.”

It was not shown that other counsel could not be employed and in the absence of such showing we contend that this Court will not say that the trial judge who was familiar with the circumstances, abused his discretion.

Graff v. Brown, 85 Ill. 89, at 93.

Berentz v. Belmont Oil Co., (Cal.), 84 Pac. 47 at 50.

The trial judge’s construction of the statute in his decision filed February 7, 1921, that to grant the motion for continuance would have meant continuing the case until September 1st, appears to have also been the view of Defendant’s Counsel as shown in Mr. Carlsmith’s affidavit (R. 25) and his request to the Court, that the case stand over till September 1st (R. 120).

We quote the statute—Hawaiian Session Laws 1919, Act 27, Section 2:

“Length and extension. The terms of the circuit courts may continue and he held, subject to adjournment from time to time or without day, as follows: In the first, second, *fourth* and fifth circuits *until the time fixed by law for the commencement of the next succeeding term*; in the third circuit for twenty-four days, subject to extension by the presiding judge of not more than twelve days thereafter; provided that Sundays and legal holidays shall be excepted; that *any term shall continue* so long as necessary for the sole purpose of concluding any trial begun before the time when such *term would otherwise expire, and no trial in any term case shall be had in July and August*; and that the terms in North Kohala and Waiohinu shall be held for the trial of such cases only as do not require a jury, and that no jurors, grand or trial, shall be summoned for such terms. It is further provided, that for the year 1919 the term of court of the second circuit shall commence on the third Wednesday of March, 1919, and shall continue until the second Monday of January, 1920.”

The term in the Fourth Circuit, where this case was tried, is continuous and the provision of the Statute, “that any *term* shall continue so long as necessary for the sole purpose for concluding any trial begun before the time when said term would otherwise expire,” can have no application to continuing the *term* in the Fourth Circuit into and through July and August.

The provision that no trial shall be “had” in July and August, therefore, must comprise not only the commencement, but the continuance of a trial in those months. The Hawaiian Legislature realized this state

of the law and changed it by Act 77 of the Session Laws of 1921 to read in this respect as follows:

“Provided, further, that no trial in any contested term case shall be *commenced* in July and August.”

It was contended by the Defendant in the Court below that the trial court erred, in refusing to grant the motion for continuance, upon the ground that the refusal of the court was based upon an erroneous construction of the law. A reading of the court's ruling at the time the motion was overruled, shows that the court's action was based on its discretionary power and does not contain any reference to the statute above quoted. (R. 234-235.) It was not until the Court rendered its decision in 1921 that any mention was made of the statute, (R. 35-36), and it was shown clearly that the court's action was not based on the construction of the statute, and that even if the Court was in error, which we submit it was not, in its construction of the statute, the Court's ruling would have been the same.

Defendant cited 2 R. C. L., pp. 213-214, which states that,

“Where a Court bases its action solely on the want of power to grant the order applied for, and not on the exercise of its discretionary power, such action is subject to review.”

It will be noted that in order to render the trial court's decision reviewable on this ground, it must appear,

First, that the Court based its refusal on the want of power to grant the order and that its decision was solely on that ground; and

Second, that the Court refused to exercise any discretionary power.

Katz. v. De Wolf, Ann. Cas. 1914 B, 237 at 239.

REMAINING ASSIGNMENTS OF ERROR

We have dealt with assignments of error numbers 1, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16. We will deal with the remainder.

ASSIGNMENT No. 2

Defendant contends that the trial court undertook an unnecessary, unfair and hostile examination of Defendant while he was upon the witness-stand in his own behalf.

The Statute already quoted provides:

“That no error going to the admission or rejection of evidence . . . shall be considered by the Supreme Court unless the same was made the subject of an exception noted at the time the alleged error was committed.”

The record fails to disclose that Defendant's Counsel excepted to the Judge's examination of the Defendant at the trial on the grounds mentioned or on any other grounds.

Questions not properly reserved for review in the trial court will not be noticed on appeal.

Kennedy v. Sniffen, 23 Haw. 115 at 119.

Murphy v. Maui Pub. Co., 23 Haw. 804 at 812.

Objections made to the form of a question for the first time on appeal will not be considered.

Wong Hoon Kau v. Lui Yan, 16 Haw. 437 at 435.

Territory v. Johnson, 16 Haw. 743, 756.

ASSIGNMENT No. 3.

This assignment raises the question of the right of the trial court after both Plaintiff and Defendant had rested and submitted the cause for the consideration of the Court, to call a witness to the stand and examine him.

This assignment of error is not supported by the record as it does not show that the cause had been submitted. The record shows that counsel when the trial concluded on June 29th were allowed to file briefs and it does not show that the briefs were filed before September 1st, when the case was reopened and the witness recalled. (R. 291.)

The trial court stated that it recalled Mr. Shipman, "for the purpose of taking such evidence as it feels necessary, covering some questions of fact, which the Court is now in doubt" about (R. 291). Defendant's Counsel took a general objection and exception without stating any grounds. (R. 291-292.) We submit that general objections are not reviewed in an Appellate Court.

In *Kamahalo v. Coelho*, 24 Haw. 689 at 693, the Court held that the Trial Judge had the right to call

witnesses to supplement the evidence produced by the parties when he believes it necessary.

The other evidence in the record is sufficient to support the Court's findings, and this supplemental evidence only covered "some questions of fact."

ASSIGNMENT No. 4

This assignment states that the trial court committed error in examining O. T. Shipman in a manner intended and calculated to prejudice the Defendant in this cause.

In *Rinaldi v. Rinaldi*, (N. J. decided 1922), 118 Atl. 685 at 688, the Court said:

"The Court of its own motion and in the interest of justice will sometimes permit the taking of further testimony to legally establish what has been insufficiently proved. *Kirschbaum v. Kirschbaum*, 92 N. J. Eq. 7, 12, 111 Atl. 697."

Ahana v. Ins. Co., 15 Haw. 636, 640.

The record shows (R. 292-300) that Defendant's Counsel did not except to the examination complained of upon any of the grounds stated in this assignment, though he excepted on a number of other grounds. It is submitted that the objection now made being raised for the first time on appeal will not be considered by this Court.

The trial court's examination was for the purpose of clearing up doubts.

The examination does not appear to be "intended

and calculated to prejudice the defendant," unless this is an admission that the facts, if ascertained, would prejudice him. Counsel were given the opportunity to cross-examine and declined.

CONCLUSION

The case was decided upon the facts, the evidence was conflicting, and the credibility of witnesses was involved, all of which we submit are not reviewable on writ of error. It is submitted that no error was committed by the trial court and that the Judgment should be affirmed.

Dated, Honolulu, T. H.,
October 3, 1923.

Respectfully submitted,

J. LIGHTFOOT,
H. EDMONDSON,
Attorneys for the Plaintiff,
Defendant in Error. RA.

